Setti D. Warren
Mayor

City of Newton, Massachusetts
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1000 Commonwealth Avenue Newton, Massachusetts 02459

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James Freas
Acting Director

CONTINUED PUBLIC HEARING MEMORANDUM

DATED: October 24, 2014

TO: Land Use Committee

MEETING DATE: October 28, 2014

FROM: James Freas, Acting Director of Planning and Development
Alexandra Ananth, Chief Planner for Current Planning

COPIED: Applicant
Mayor Setti D. Warren
Ward 8 Aldermen: Cheryl Lappin, Richard Lipof, and David Kalis
Julie Ross, Law Department
Ouida Young, Law Department
Lou Taverna, P.E., City Engineer
William Paille, Director of Transportation
Land Use Committee

SUBJECT: Board of Aldermen **Petition #210-14**, 135 Wells Avenue, LLC, requesting an amendment to the Wells Avenue restrictive covenant as established in Board Order #276-68(3), as amended, as it relates to parcel E-2 at 135 Wells Avenue, to allow creation of a multi-family housing building and co-working space and to accept mitigation funds in accordance with M.G.L. Chapter 44, Section 53A under the terms and conditions described in an application from Cabot, Cabot, and Forbes, dated May 27, 2014.

135 Wells Avenue **Petition #210-14**

In response to questions raised at the Land Use Committee (LUC) public hearing on June 25, 2014, and/or staff technical reviews, the Planning Department is providing the following information for the October 28, 2014 continued public hearing. This information is supplemental to the staff analysis previously provided at the last public hearing.

The Board of Aldermen is being asked by the applicant for amendments to the controls set forth in the Deed Restriction, as they relate to the proposed project at 135 Wells Avenue for a multi-family residential project under M.G.L. c. 40B comprehensive permit. The specific amendments the petitioner is seeking are laid out by the applicant in the Requested Amendments to Wells Avenue Restrictions (**ATTACHMENT A)**. These amendments include but are not limited to:

- the square foot limitation on gross floor area that may be built in the Wells Avenue Office park;
- to waive the 40% open space requirement to approximately 35%;
- to waive the FAR limit of .25 to allow for an FAR of 1.51 plus structured parking;
- to amend the use restrictions to allow multi-family residential use;
- to waive setback requirements;
- to allow a building and parking on Area 1A, where it is expressly restricted as shown on the plan accompanying the Wasserman-Howard deed; and
- for signage and lighting.

The proposed project, and its requested waivers, raise serious issues relative to the City's overall policies and goals for the Wells Avenue Business Park, most significantly in the idea of incorporating a large residential use into the Park. In 1968 the City purposefully rezoned Parcel 1 (now the Wells Avenue Office Park) from Residential to Limited Manufacturing, and imposed the Deed Restriction in order to create this office park. Allowing residential use in the office park is counter to the City's vision for this area when the Deed Restriction was created. Additionally, because the Office Park was surrounded by environmentally sensitive areas including wetlands, flood hazard areas, conservation areas, endangered species habitat, and the Charles River, the Deed Restriction imposed additional strict density and dimensional controls, presumably to protect these sensitive resources.

Condition #7 of the Deed Restriction prohibits "building(s) or structure(s)… within the triangular area in the southeasterly corner of Parcel 1, as shown on said plan as Area 1A," **(ATTACHMENT B & C)**. The Planning Department does not know why this area was excluded from being built upon, but we note that the proposed project significantly encroaches into this restricted area **(ATTACHMENT D & E),** which may be problematic and counter to the original intent of the Deed Restriction. The applicant should provide any information they have on why this Building Restriction was included in the Deed, and their rationale for their projects significant encroachment into this area.

Both the applicant and the City's Law Department have prepared briefs on the authority of the Board of Aldermen and the Zoning Board of Appeals to waive the Deed Restriction **(ATTACHMENT F & G).** Also included for your review is a legal brief from Rackerman, Sawyer & Brewster, representing Mt. Ida College **(ATTACHMENT H).**

Since the June Public Hearing the applicant has proposed a number of off-site improvements that the applicant is expected to present at the continued public hearing on Tuesday. Included is a commitment to facilitate the design of a second access to Wells Avenue. Although the Planning Department is very supportive of the concept of a second means of access to Wells Avenue, the Planning Department has concerns about the feasibility of the applicant's proposal. We note that the conceptual plan involves permitting a new road through wetlands and the 100-foot buffer to wetlands, and through a Conservation Restriction held by the City on lands owned by the Nahanton

Woods Condominium. The applicant should be prepared to explain how they believe the Executive Office of Energy and Environmental Affairs would perceive an amendment to the Conservation Restriction for such a roadway, and should provide relevant examples of how/where this has been done before. We also note that this proposed new roadway runs through 2 Wells Avenue's property, and the City has not had discussions with this property owner about their willingness to cooperate should this plan be determined feasible.

The Planning Department has engaged the Metropolitan Area Planning Council to complete a market study as a first step towards a strategy to guide the future development of Wells Avenue as part of the N^2 Innovation Corridor initiative. This project is expected to be completed in early 2015.

Recommendation: Newton has always been deeply committed to the creation of affordable housing opportunities in the City, which is demonstrated by its 2,441 affordable housing units (812 units created between 2002 and 2013), and welcomes well-planned comprehensive permits at appropriate locations that are fittingly designed for the existing neighborhood context. However, not every site is appropriate for residential use and Wells Avenue offers complicated trade-offs. The location of the proposed development does not appear to be consistent with the *Newton Comprehensive Plan*, affordable housing goals, the goals of the N^2 Innovation Corridor, or smart growth principles, which rely on a robust mix of uses and amenities with a variety of transportation connections. The lack of walkability and access to transit options ensures a high number of vehicle trips and raises questions about the site and the projects inherent lack of sustainability, particularly for mixed-income affordable housing. Approval of this project will introduce housing as a new use to this Office Park, which may also compromise Wells Avenue's fiscal value to the City.

The *Newton Comprehensive Plan*, adopted in 2007, notes that land development in the Wells Avenue Office Park "*should continue to encourage office and business uses (perhaps more intensively) in this location and exclude other uses as a means of maintaining the City's employment and tax base*."[1] The City values its limited commercially zoned real estate and is concerned about the conversion of this site from commercial to residential use. Since the City is predominantly a residential suburb, the real estate zoned for commercial and manufacturing uses is limited and must be maintained to ensure a strong commercial tax base in the City.

Finally, in addition to the land use issue, the Planning Department believes the applicant is seeking too many density and dimensional waivers from the Deed Restriction, including building in the Building Restriction Area 1A, indicating that the proposed building is too dense for this site, and that the use as developed may adversely affect the environment.

[1] Newton *Comprehensive Plan*, 2007. Page 3-28.

ATTACHMENTS

ATTACHMENT A:	**Requested Amendments to Wells Avenue Restrictions**
ATTACHMENT B:	**Deed Restriction**
ATTACHMENT C:	**Map of Parcel 1, showing Limit of Building Restriction Area 1A**
ATTACHMENT D:	**135 Wells Avenue Existing Conditions Plan showing Limit of Building Restriction**
ATTACHMENT E:	**135 Wells Avenue Proposed Site Plan showing encroachment into the Limit of Building Restriction**
ATTACHMENT F:	**Law Department Memorandum, dated October 17, 2014**
ATTACHMENT G:	**Legal Briefs from Michael D. Vhay, Esq.**
ATTACHMENT H:	**Legal Briefs from Rackerman, Sawyer & Brewster**
ATTACHMENT I:	**Draft Board Order (submitted by applicant)**

Exhibit C

REQUESTED AMENDMENTS TO WELLS AVENUE RESTRICTIONS

Blanket amendment of the restrictions set forth in a deed from Isadore Wasserman and Edwin M. Howard, as Trustees of the Newton at 128 Realty Trust, u/d/t dated June 10, 1967, and recorded with the Middlesex (South) Registry of Deeds in Book 11419, Page 019, which deed is recorded with the Registry in Book 11699, Page 535 (the "Wasserman-Howard deed"), as those restrictions may have been amended or waived from time to time by the Newton Board of Aldermen, releasing those restrictions as they relate to 135 Wells Avenue site for so long as the project and the site are developed and used for a multi-family residential project allowed under a G.L. c. 40B comprehensive permit.

If specific amendments are to be granted, rather than a blanket amendment, amendments are requested to the following paragraphs of the Wells Avenue restrictions:

- Paragraph 1 –amendment of 800,000 square foot limitation on gross floor area, as may have been amended, to allow 417,500 square feet of gross floor area, plus structured parking at 135 Wells Avenue, and amendment of the requirement that at least 40% of each parcel be maintained as open space not occupied by buildings, parking or loading areas or roadways to require that at least 35% of 135 Wells Avenue be so maintained.

- Paragraph 2 – amendment of the parcel FAR limit of 0.25, to allow an FAR of 1.51 (plus structured parking).

- Paragraph 3 – amendment to remove the requirement the Aldermen's approval of finished grading, topography, drainage, parking, and landscaping plans.

- Paragraph 4 – amendment of the use restrictions to allow multi-family residential use, the retail sale of tangible personal property to consumers, up to 6,000 square feet of mixed-use office/flex/café/automat space, and up to 5,000 square feet of rental/management/automat space at 135 Wells Avenue.

- Paragraph 5 – amendment to allow buildings and parking areas within 80 feet of northeasterly boundary of Parcel 1.

- Paragraph 6 – no amendment requested.

- Paragraph 7 – amendment to allow building on Lot 1A as shown on the plan accompanying the Wasserman-Howard deed.

- Paragraph 8 – amendment of sign restrictions to allow any signs permitted under the Newton Zoning Ordinance, by right or by special permit, or as permitted by a comprehensive permit under c. 40B.

- Paragraph 9 – amendment to allow lighting to direct light onto Wells Avenue and adjoining properties as may be approved by a comprehensive permit under c. 40B.

Blanket amendments to the Wasserman-Howard deed set forth in unrecorded Board of Aldermen Order 734-72, dated August 9, 1972, as those amendments may have been amended or waived from time to time by the Board of Aldermen, releasing the site from all applicable provisions for so long as the Project and site are developed and used for a multi-family residential project allowed under a G.L. 40B comprehensive permit. If specific amendments are to be granted, rather than a blanket amendment, amendments are requested to the following paragraphs of Board Order 734-72

- Paragraph 1 – amendment to not require that future site work such as removal of fill or disturbance of vegetation undertaken at 135 Wells Avenue be performed only in accordance with Paragraph 2.

- Paragraph 2 – amendment to no longer require that (a) preliminary site plan, grading plan, and landscaping plans be submitted to the Planning Department for prior review, and (b) such plans be approved by the Board of Aldermen, prior to site preparation for any development undertaken at 135 Wells Avenue pursuant to a comprehensive permit under c. 40B.

- Paragraph 2A – amendment to make the parcel subject to the provisions of the Flood Plain and Watershed Zoning Ordinance only to the extent that the language of the ordinance makes it applicable to the parcel and, if the ordinance is applicable, to remove the requirement for a 2/3 vote of the Aldermen approving development undertaken pursuant to a comprehensive permit under c. 40B.

- Paragraph 3 – no amendment requested.

- Paragraph 4 – no amendment requested.

- Paragraph 5 – amendment of prohibition on use of salt or associated chemicals on roadways and parking areas to allow their use at 135 Wells Avenue.

- Paragraph 6 – no amendment requested.

BK11699 PG535

P9'

KNOW ALL MEN BY THESE PRESENTS

that Isadore Wasserman and Edwin M. Howard, as they are Trustees of the Newton at 128 Realty Trust, under a Declaration of Trust dated June 30, 1967 and recorded with Middlesex District Registry of Deeds, Book 11419, Page 019, for consideration paid, hereby grant unto the City of Newton, a municipal corporation duly organized and existing in Middlesex County, Massachusetts, with quitclaim covenants, the land in Newton, Middlesex County, lying off Nahanton Street, bounded and described as follows:

NORTHERLY on Nahanton Street 170 feet;

NORTHEASTERLY by other land of the Grantors by three courses, as shown on the Plan hereinafter referred to, said courses running Southerly and Southeasterly in directions shown on said plan to a point on the Southeasterly boundary of the Grantors' premises 300 feet Northeasterly from the Southwesterly corner of said premises;

SOUTHEASTERLY, SOUTHWESTERLY, WESTERLY by land of the Metropolitan District Commission;

be all of said measurements and distances more or less and containing 30.5 acres more or less.

Being shown as Parcel 2 on a Plan dated July 6, 1960 entitled "Plan to Accompany Option Agreement," etc., recorded with Middlesex South District Deeds on August 2, 1960 as Plan No. 1183, recorded in Book 9645, Page END. Meaning and intending to convey the same premises which is more accurately shown on a "Plan of Land Newton, Mass." dated September 11, 1968 by Alonzo B. Reed, Inc., Engineers and Architects, Boston, Massachusetts, and being shown as Parcel 2 on said Plan containing 30.2 acres.

Subject to the restrictions for the benefit of adjoining premises of the Grantors that for a period of ninety-nine (99) years from date, no buildings or structures shall be erected or maintained on the granted premises except for recreation, conservation or parkland purposes (but this shall not be deemed to prohibit construction of fences thereon).

Together with the following restrictions, as appurtenant to the whole or any part of the granted premises, which are hereby imposed on the adjoining premises shown on said plan as Parcel 1, containing 123.1 acres; said restrictions shall run with the land and the Grantors hereby covenant and agree with the Grantee that they will be faithfully observed and performed:

1. There shall not be built or maintained on said Parcel 1, or on any one subparcel or group of subparcels constituting Parcel 1, buildings containing on all floors thereof a total of more than 800,000 square feet.

   Further, there shall be maintained on said Parcel 1, or on any one subparcel or group of subparcels constituting Parcel 1, at all times at least 40% of the ground area in open space not occupied by buildings, parking or loading areas or roadways.

   Part of said open space shall be located as shown on a plan entitled "Topographic Plan of Land" dated August 27, 1968, and filed herewith, and shall be retained in its present natural condition and with its present topography and vegetation. (Said required open space on the above-mentioned plan approximates 14.4 acres or 11.7% of Parcel 1.)

   Further, ground elevations along the westerly and southwesterly boundary line between said Parcel 1 and Parcel 2 shall be retained at their present levels at every point along said line.

2. Subject always to the provisions of paragraph 1 above, the ratio of the gross floor area of all buildings on said Parcel 1, or any one subparcel or group of subparcels constituting Parcel 1, to the total land area of said parcel or parcels shall not exceed 0.25.

3. No building or structure shall be erected on said Parcel 1, or on any one subparcel or group of subparcels constituting Parcel 1, without the prior approval of the Board of Aldermen with respect to the following specific items: finished grading and topography, drainage, parking and landscaping.

4. No building or structure or enlargement or extension thereof within said Parcel 1, or any one subparcel or group of subparcels constituting Parcel 1, nor any land included within said Parcel 1, shall be used for the retail sale of tangible personal property to consumers, for a freight or transfer terminal or fuel distribution plant.

Further, no building or structure or alteration, enlargement or extension thereof within said Parcel 1, nor any land included within said Parcel 1 shall be used for any purpose which is injurious, obnoxious or offensive to the neighborhood by reason of noise, smoke, odor, gas, dust or similar objectionable features, or is dangerous to a neighborhood on account of fire or any other cause.

Further, no building or structure or alteration, enlargement or extension thereof within said Parcel 1, nor any land included within said Parcel 1 shall be used except for one of the following purposes:

a. Wholesale business or storage warehouse, but excluding perishable goods and all food products (not more than 85% of floor area in any one structure);

b. Telephone central office and exchange building;

c. Offices and banks (not more than 50% of the gross floor area of 800,000 square feet permitted hereby on said Parcel 1, or any one subparcel or group of subparcels constituting Parcel 1, shall be used for office space);

d. Carpenter or woodworking shop;

e. Casting lightweight and nonferrous metals, and spinning ferrous and nonferrous metals;

f. Glass fabrication and installation;

g. Laboratory, research and development;

h. Machine shop (excluding presses over 10 tons), plumbing and blacksmith shop;

i. Metal fabrication light (such as sheet metal, ducts, gutters and leaders);

j. Molding, shaping or assembly from prepared materials (including repairs) of boxes, ladders, staging, toys, stationery, novelties, paper boxes, toilet preparations, drugs, perfumes, flavoring extracts, medical and hygienic appliances, clothing, textiles, hats, leather and sporting goods, mattresses, store and office equipment, house, office, theatre and playground equipment, signs, musical instruments, art goods, industrial models, tools, appliances, electrical goods;

k. Optical and scientific instruments, jewelry manufacturing;

l. Printing, publishing and reproduction establishments;

m. Wearing apparel, fabrication and processing;

n. But nothing herein shall prohibit the carrying on of such accessory uses as are proper and usual in connection with said above permitted uses.

5. No building or parking area shall be located or maintained within 80 feet of the northeasterly boundary line of said Parcel 1, as shown on said plan, except that parking areas shall be permitted at a distance of 40 feet from the portion of said boundary line designated on said plan as "950" feet.

6. No building or structure is to be erected within 80 feet of the northerly boundary line of said Parcel 1, measuring 1,900 feet, which line runs approximately parallel to and 180 feet or more distant from the southerly side line of Nahanton Street.

No building on said Parcel 1 shall exceed in height a total which equals more than 10 feet of height for every 100 feet of distance from the nearest point of the southerly street line of Nahanton Street, adjusted proportionately for any proportion of such 100-foot distance.

7. No building or structure shall be built or maintained within the triangular area in the southeasterly corner of said Parcel 1, as shown on said plan as "Area 1A."

8. No sign, billboard or other outdoor advertising device shall be placed or maintained on the premises, except identification and directional signs, as follows:

   a. One free-standing sign at any entrance to the premises, not to exceed 150 square feet in area or 15 feet in height;

   b. Surface mounted signs located on the exterior walls of buildings;

   c. Free-standing signs not to exceed 12 square feet in area.

   All signs shall be stationary and shall not contain any visible moving or movable parts; no sign shall be of a neon type or exposed gas-illuminated tube type; any lighting of a sign shall be continuous, indirect and installed in a manner that will prevent direct light from shining onto any street or adjacent property.

9. Any lighting provided in the premises shall be installed in a manner which will prevent direct light from shining onto any street or adjoining property.

10. In connection with any construction or site development work undertaken on said Parcel 1, no excavation or construction traffic of any nature shall make use of Nahanton Street except that portion from the Kendrick Street bridge to the Nahanton Street entrance to Parcel 1, and the contract specifications therefor shall contain such a limitation.

11. The restrictions set forth in the paragraphs 1 through 10 above shall continue in force for a period of ninety-nine (99) years from December 1, 1968.

Subject to such rights and restrictions as were of record on June 27, 1960, so far as the same are now in force and applicable.

And further subject to the order of conditions of the Department of Natural Resources, dated December 13, 1968, pursuant to Section 40, Chapter 131 of the Massachusetts General Laws, which order is duly recorded in said Deeds.

And further subject to the right of the Grantors, their successors and assigns, to establish and maintain a drain easement on two (2) strips of land located on the premises conveyed hereunder, as shown on said plan as "50' permanent drain easement", together with the right of the Grantors, their successors and assigns, to enter upon the premises herein conveyed for the purpose of maintaining the said drain easement.

And further subject to real estate taxes for the year 1969 as may be assessed on the premises.

Signed and sealed this 22nd day of May, 1969.

By Isadore Wasserman
Isadore Wasserman, Trustee and
not individually
Newton at 128 Realty Trust

By Edwin M. Howard
Edwin M. Howard, Trustee and
not individually
Newton at 128 Realty Trust

May 22, 1969

Accepted on behalf of the City of Newton, subject to the Restrictions and Conditions hereinabove set forth, pursuant to Order # 360 of the Board of Aldermen dated June 27, 1960 as amended by Order #276-68(3) of the said Board of Aldermen dated November 18, 1968.

City of Newton

By

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

Then personally appeared the above-named Isadore Wasserman and Edwin M. Howard and acknowledged the foregoing to be their free act and deed, before me

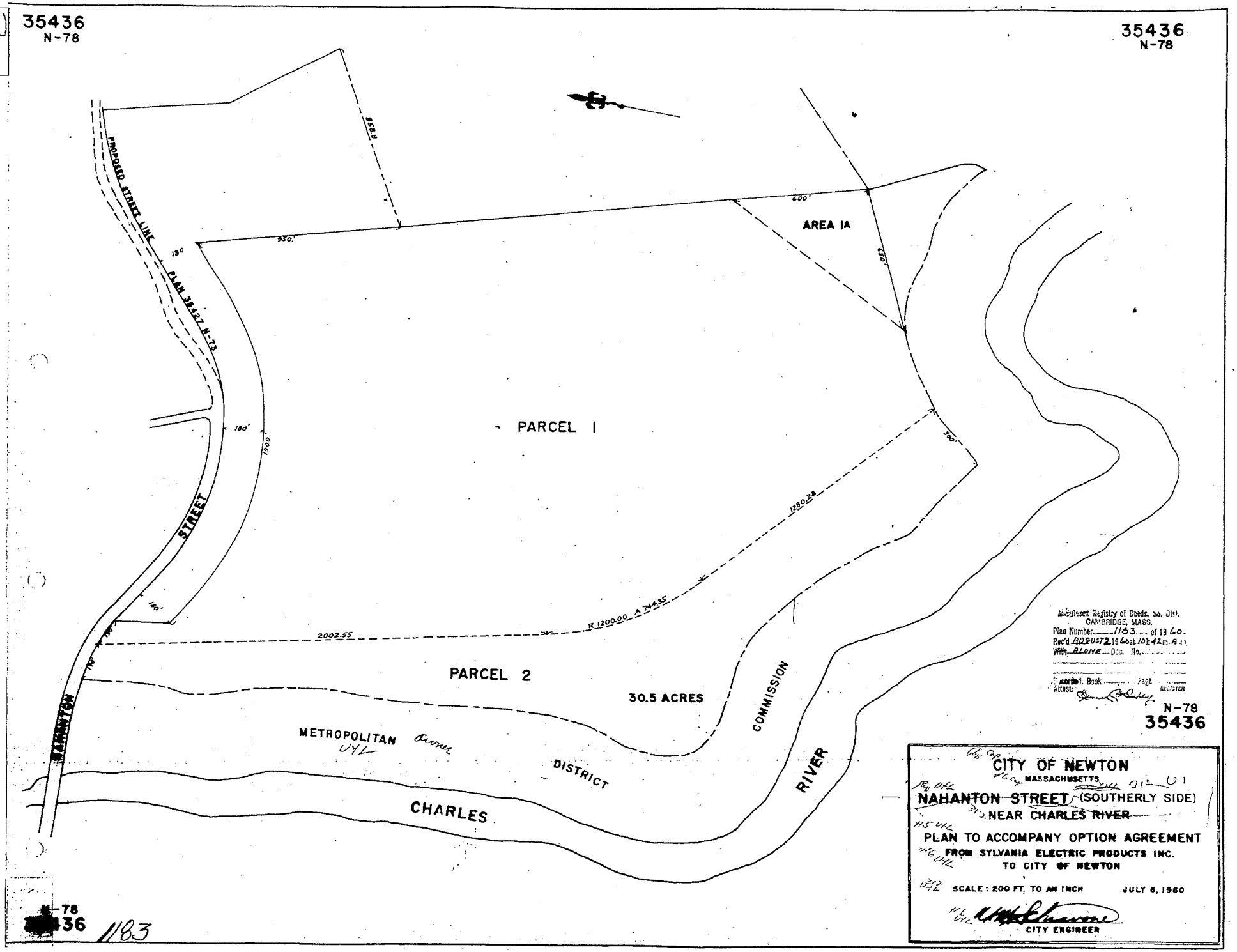
Oscar A. Wasserman
Notary Public
Oscar A. Wasserman

My Commission Expires: 11/30/73

ATTACHMENT C

Attachment B

35436
N-78



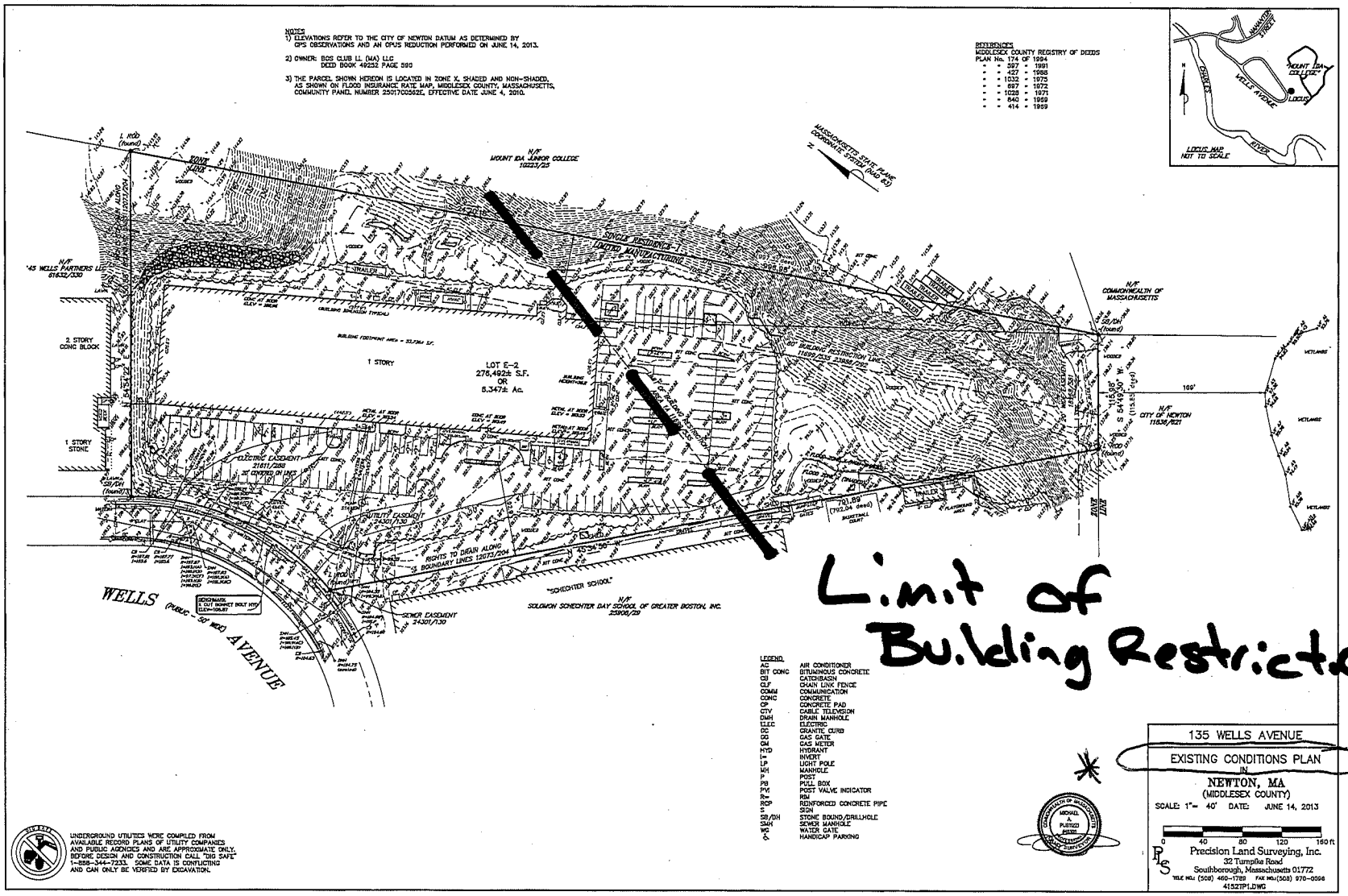
35436
N-78

Registry of Deeds, So. Dist.
CAMBRIDGE, MASS.
Plan Number 1183 of 19 60
Rec'd AUGUST 2 19 60 at 10h 42m A.M.
With ALONE Doc. No.
Recorded, Book Page
Attest: REGISTER

N-78
35436

CITY OF NEWTON
MASSACHUSETTS
NAHANTON STREET (SOUTHERLY SIDE)
NEAR CHARLES RIVER
PLAN TO ACCOMPANY OPTION AGREEMENT
FROM SYLVANIA ELECTRIC PRODUCTS INC.
TO CITY OF NEWTON
SCALE: 200 FT. TO AN INCH JULY 6, 1960
CITY ENGINEER

N-78
35436
1183



Limit of Building Restriction

ATTACHMENT D

CUBE 3 studio
architecture interiors planning

300 Merrimack Street Lawrence, MA 01843
phone: 978.668.8668 www.cube3studio.com

135 Wells Ave

Newton, MA

Cabot, Cabot & Forbes

125 Summer Street
Suite 1800
Boston, MA 02110

Comprehensive Permit Set

As Noted
13 May 2014
13063.00

Existing Conditions

A-010

PARCEL 1 - LAND USAGE TABLE - LIMITED MANUFACTURING (LM)

ITEM	REQUIRED/ALLOWED	EXISTING	PROPOSED
MINIMUM LOT AREA	N/A	6.35 ACRES	6.35 ACRES
MINIMUM FRONTAGE	80 FT.	229.9 FT.	229.9 FT.
MINIMUM FRONT YARD	25 FT.	98.5 FT.	25.0 FT.
MINIMUM SIDE YARD	20 FT.	23.9 FT.	20.0 FT.
MINIMUM REAR YARD	40 FT.	67.3 FT.	28.0 FT.
MAXIMUM BUILDING HEIGHT	36 FT. (3 STORIES)	38.2 FT (2 STORIES)	69.0 FT. (6 STORIES)
MAXIMUM LOT COVERAGE	25%	19.4%	48.0%
MAXIMUM FAR	N/A	0.19	1.51*

*DOES NOT INCLUDE GARAGE AREA

OFF-STREET PARKING SUMMARY

MULTI-FAMILY: 2.0 SPACES/UNIT, 1.25 SPACES/UNIT (WITH SPECIAL PERMIT)

334 UNITS X (1.25 SPACES/UNIT) = 418 PARKING SPACES

MULTI-FAMILY PROPOSED = 418 PARKING SPACES

OFFICE: 1 SPACE/250 SQUARE FEET OF GROSS FLOOR AREA

5,830 SQ. FT. / 250 = 24 PARKING SPACES

TOTAL REQUIRED: 418 + 24 = 442 PARKING SPACES

ADDITIONAL SPACES: 59 SPACES

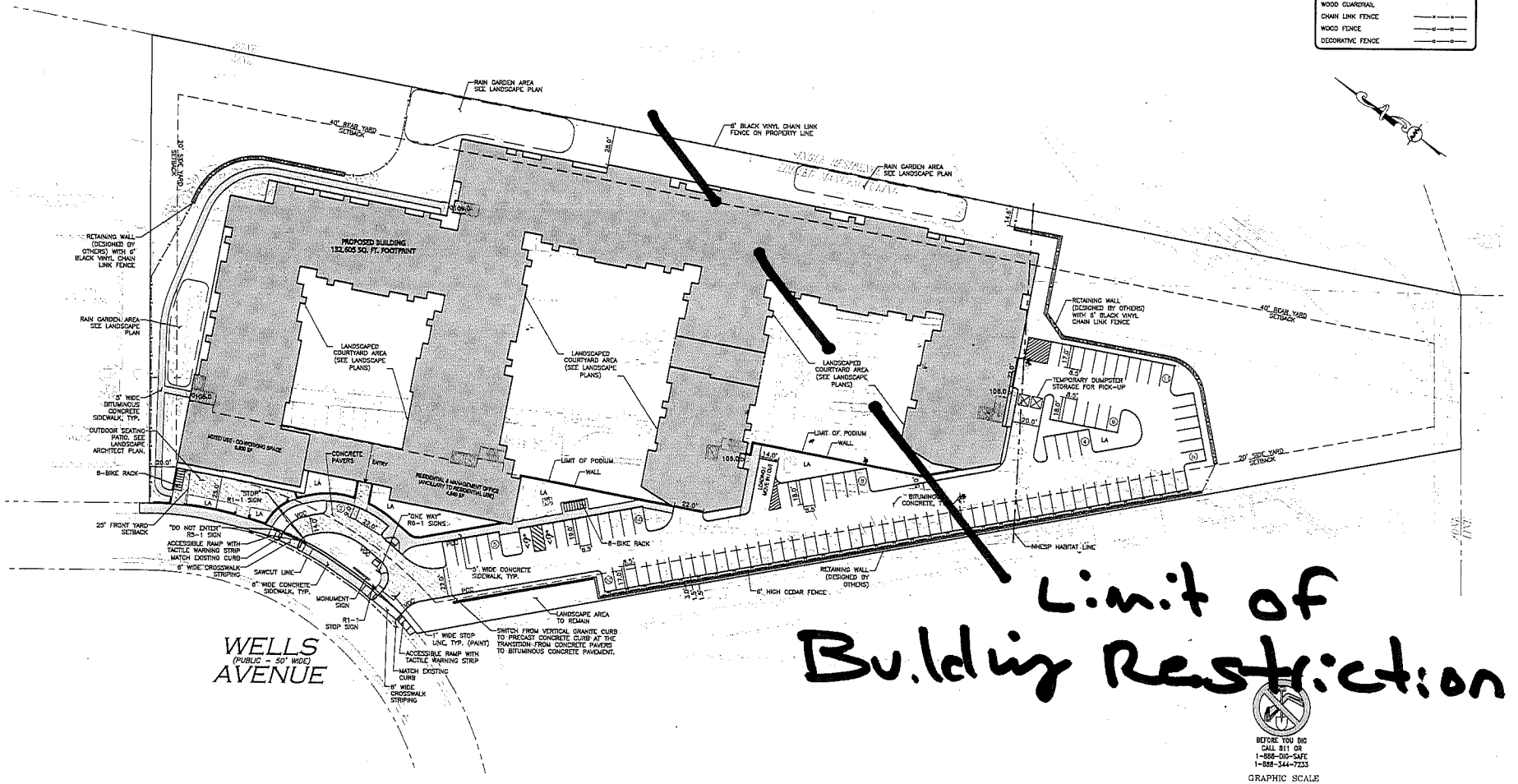
	STANDARD SPACES		ACCESSIBLE SPACES		TOTAL SPACES	
	PROPOSED	REQUIRED	PROPOSED	REQUIRED	PROPOSED	REQUIRED
FINAL PARKING	491	432	10	10	501	442

NOTES:

1. THE LOCATIONS OF EXISTING UNDERGROUND UTILITIES ARE SHOWN IN AN APPROXIMATE WAY ONLY AND HAVE NOT BEEN INDEPENDENTLY VERIFIED BY THE OWNER OR IT'S REPRESENTATIVE. THE CONTRACTOR SHALL DETERMINE THE EXACT LOCATION OF ALL EXISTING UTILITIES BEFORE COMMENCING WORK, AND AGREES TO BE FULLY RESPONSIBLE FOR ANY AND ALL DAMAGES WHICH MIGHT BE OCCASIONED BY THE CONTRACTOR'S FAILURE TO EXACTLY LOCATE AND PRESERVE ANY AND ALL UNDERGROUND UTILITIES.
2. THE INFORMATION SHOWN ON THIS PLAN IS THE SOLE PROPERTY OF ALLEN & MAJOR ASSOCIATES, INC. IT'S INTENDED USE IS TO PROVIDE INFORMATION. ANY ALTERATION, MISUSE, OR RECALCULATION OF INFORMATION OR DATA WITHOUT THE EXPRESSED, WRITTEN ALLEN & MAJOR ASSOCIATES, INC PROHIBITED.
3. ALL RADII SHALL BE 3' UNLESS OTHERWISE NOTED.
4. ALL CURBING SHALL BE PRECAST CONCRETE CURBING (PCC) UNLESS OTHERWISE NOTED.

LEGEND:

PROP. PROPERTY LINE
SIGN
BOLLARD
BUILDING
BUILDING ARCHITECTURE
BUILDING INTERIOR WALLS
CURB
RETAINING WALL
PARKING STRIPING
ROADWAY STRIPING
TRAFFIC ARROWS
HEAVY DUTY CONCRETE
SIDEWALK
BRICK SIDEWALK
ADA ACCESSIBLE RAMP
ADA DET. WARNING SURFACE
SETBACK LINE
PARKING COUNT
COMPACT PARKING STALL
STEEL GUARDRAIL
WOOD GUARDRAIL
CHAIN LINK FENCE
WOOD FENCE
DECORATIVE FENCE



Limit of Building Restriction

BEFORE YOU DIG CALL 811 OR 1-888-DIG-SAFE 1-888-344-7233

GRAPHIC SCALE

(IN FEET) 1 inch = 30 ft.

CUBE 3 studio
architecture interiors planning

350 Merrimack Street Lawrence, MA 01843
phone: 978.682.2888 www.cube3studio.com

135 Wells Ave

Newton, MA

Cabot, Cabot & Forbes

125 Summer Street Suite 1800 Boston, MA 02110

ALLEN & MAJOR ASSOCIATES, INC.

Comprehensive Permit Set

drawing by:	DCS
drawing checked:	SRC
drawing scale:	As Noted
drawing date:	May 15, 2014
project number:	13061.001622-05

no.	description	date

Layout & Materials Plan

C-2

ATTACHMENT E

* Proposed ~~Grading~~ Site Plan*

Attachment F

MEMORANDUM

To: Zoning Board of Appeals of the City of Newton

From: Julie B. Ross, Assistant City Solicitor

Re: The Authority of the Zoning Board of Appeals of the City of Newton to Grant the Approvals and Relief Requested by 135 Wells Avenue, LLC from the Wells Avenue Deed Restriction

Date: October 17, 2014

This memorandum addresses only the legal issues of the authority of the Zoning Board of Appeals of the City of Newton to grant the requested approvals and relief, and takes no position on the 135 Wells Avenue, LLC application for a comprehensive permit.

Question Presented:

Whether the Zoning Board of Appeals of the City of Newton (the "ZBA"), has authority under the Low and Moderate Income Housing Act, M.G.L. c. 40B, §§ 20-23, (the "Act") to grant the approvals and relief from the Wells Avenue Deed Restriction (the "Deed Restriction") requested by 135 Wells Avenue, LLC (the "Applicant") in its application for a comprehensive permit?

Short Answer:

For the reasons set forth below, the Deed Restriction constitutes a private interest in land, the disposition of which is a legislative function pursuant to M.G.L. c. 40, § 3.[1] Accordingly, granting approvals and relief from the Deed Restriction is not within the authority granted to the ZBA by the legislature under M.G.L. c. 40B, § 21 to "issue permits or approvals".

Legal Analysis:

I. History of the Wells Avenue Deed Restriction.[2]

The properties located at Wells Avenue in Newton are subject to a Deed Restriction that imposes a number of conditions on the development and use of these properties, in addition to the City's zoning controls. In 1960, the property's owner, Sylvania Electric Products, Inc., gave the City an option to purchase a 30.5 acre parcel of land on Nahanton Street in Newton at a

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[1] See M.G.L. c. 39, § 1; and Sancta Maria Hospital v. Cambridge, 369 Mass. 586, 592 (1975).

[2] The Law Department refers the ZBA to Applicant's June 12, 2014 and August 1, 2014 memoranda for a more detailed history of the Deed Restriction.

reduced price. See July 6, 1960 Option Agreement, Middlesex South Registry of Deeds, Book 9630, Page 048. If exercised, the option imposed controls on the development of the remainder of the property, which were more stringent than the zoning controls in effect at that time.

In 1967, Sylvania conveyed the property to Isadore Wasserman and Stephen Hopkins, as Trustees of the Newton at 128 Realty Trust. See October 26, 1967 Deed, Middlesex South Registry of Deeds, Book 11419, Page 029. In 1969, the City exercised the option to purchase the 30.5 acre parcel pursuant to a deed from Isadore Wasserman and Edwin Howard, conveying the parcel to the City of Newton, and imposing certain development restrictions, known as the "Wells Avenue Deed Restriction" on the remaining 123.1 acre parcel retained by the owner.[3] See May 22, 1969 Deed, Middlesex South Registry of Deeds, Book 11699, page 535.

The Board of Aldermen is the authority vested with oversight of the Deed Restriction, pursuant to M.G.L. c. 40, § 3 ("[a]ll real estate or personal property of the [city]...placed in the charge of any particular board, officer or department, shall be under the control of the [Aldermen]").[4] Since 1969, the Deed Restriction has been amended on 17 occasions.

II. The Deed Restriction Is Not A Permit or Approval Within the Scope of Authority Granted to the ZBA by M.G.L. c. 40B, § 21.

A. The Groton Case Is Controlling Precedent.

It is well settled that a deed restriction is an interest in land. See Wolfe v. Gormally, 440 Mass. 669, 706-07 (2004) (Restrictive covenants are both an interest in real estate and an encumbrance on title); Blakeley v. Gorin, 365 Mass. 590, 595, (1974); (Deed restrictions administered by the Commonwealth limiting the use of the land are a property interest in land). Because the Deed Restriction is part of an agreement between Sylvania Electric Products and the City of Newton and constituted a private interest in land, it is not a "permit or approval" under M.G.L. c. 40B, § 21.[5] Indeed, the Supreme Judicial Court (the "SJC") has explicitly held that the authority of the Housing Appeals Committee (the "HAC"), and by implication, a Zoning Board of Appeals, under the Act does not extend to transfers of interests in land, which are regulated by State law. Zoning Board of Appeals of Groton v. Housing Appeals Committee, 451 Mass. 35, 39, 41 (2008). In the Groton case, the SJC held that the HAC could not order the town to convey

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[3] A deed restriction is a form of a *restrictive covenant*, which is defined as "a written agreement that limits the use of property for specific purposes and regulates the structures that may be built on it." *The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Edition*, (accessed October 14, 2014), <http://thelawdictionary.org/restrictive-covenant/>.

[4] M.G.L. c. 40, § 3 is applicable to cities via M.G.L. c. 40, § 1; see also M.G.L. c. 40B, § 20, defining "local board" and M.G.L. c. 4, § 7, Clause Third A (""Board of selectmen", when used in connection with the operation of municipal governments shall include any other local office which is performing the duties of a board of selectmen, in whole or in part, under the provisions of a local charter.")

[5] No court in Massachusetts has yet held that M.G.L. c. 40B abrogates the common law. Brooks v. Chelmsford Hillside Gardens, LLC, 80 Mass. App. Ct. 1106 (2011) (Rule 1:28).

an easement under the Act, and by doing so, the HAC had contravened state law. Id. at 39. Moreover, the Court clearly defined the parameters of the Act:

> The Act may only be relied on to remove *locally* imposed barriers to affordable housing, not State law governing the disposition, or transfer, of land, or interests in land, owned by municipalities. To be sure, in enacting G.L. c. 40B, the Legislature indicated that, in some circumstances, compliance with locally imposed barriers may need to yield to the regional need for affordable housing, but this legislative judgment cannot be stretched to empower the committee to act as the legislative body of a municipality for purposes of land transfers. See LeClair v. Norwell, 430 Mass. 328, 336, 719 N.E.2d 464 (1999). (Emphasis in original).

Id. at 41.

The SJC also examined in detail the meaning of the words "permits or approvals" as contemplated by the Act:

> The phrase "permits or approvals," read in the context of the entire Act, refers to building permits and other approvals typically given on application to, and evaluation by, separate local agencies, boards, or commissions whose approval would otherwise be required for a housing development to go forward. This interpretation is virtually compelled by the language, "who would otherwise act with respect to such application," appearing in § 21. The interpretation is further supported by the examples expressly cited in § 21, namely, action typically required by local permitting authorities with respect to "height, site plan, size or shape, or building materials."

Id. at 40.

Finally, the SJC held that the HAC, and by implication a Zoning Board of Appeals, has no jurisdiction over matters delegated by state law. M.G.L. c. 40, § 3 states that "[a]ll real estate or personal property of the town, not by law or vote of the town placed in the charge of any particular board, officer or department, shall be under the control of the [Aldermen]." The Groton case plainly states that the type of permits or approvals contemplated by M.G.L. c. 40B, § 21 does not extend to interests in land.

B. The White Barn Decision Is Distinguishable From The Groton Case.

The HAC decision in White Barn Lane, LLC v. Norwell Zoning Board of Appeals, HAC No. 08-05 (July 18, 2011), is inconsistent with the holding of the SJC in the Groton case.[6] In White Barn Lane, the Subdivision Control Law was the controlling state law and the interests in

[6] An appeal of the White Barn Lane decision was taken by the intervening abutter, the Norwell ZBA, and by White Barn Lane, LLC, and those three cases are pending in Plymouth Superior Court. Docket Nos. PLCV2011-00963-B, PLCV2011-00907-B, and PLCV2011-00954.

question were the subdivision covenants, in particular, the Town of Norwell Planning Board Covenant that restricted the original owner and successors in title.[7] White Barn Lane, HAC No. 08-05 at 26. In the appeal of the Norwell Zoning Board of Appeals' decision to decline to explicitly waive the Planning Board's covenant, the HAC held that "a decision to modify a covenant is a question under local law, and therefore appropriate for consideration by the Board... ." Id. at 28. In the White Barn Lane decision, the HAC acknowledges the Groton case, but nevertheless acts in direct contravention of the Groton holding. Id. It should also be noted that the White Barn Lane decision is merely an HAC decision, whereas, the Groton case is a decision of the SJC, which is controlling precedent.

III. Whether The Mayor Is A Local Official And The Board Of Aldermen Is A Local Board Who/That Would "Otherwise Act" With Respect To A Comprehensive Permit Is Irrelevant In The Context Of A Deed Restriction.

Whether or not the Mayor is a local official and the Board of Aldermen is a local board who/that would "otherwise act" with respect to a comprehensive permit is irrelevant in the context of a deed restriction, because the fact remains that the ZBA's authority with respect to comprehensive permits is *limited by statute to permits and approvals and does not extend to interests in land.* M.G.L. c. 40B, § 21; Groton, 451 Mass. at 40.

IV. The Historical Treatment Of The Deed Restriction Does Not Make It Subject To The ZBA's Jurisdiction.

The Applicant argues that the historical treatment of the Deed Restriction by the Board of Aldermen in granting various amendments since 1969 are akin to "local permits or approvals" and therefore subject to the ZBA's jurisdiction under M.G.L. c. 40B. See Applicant's Memorandum, August 1, 2014, at p. 10. The Applicant is incorrect. The historical treatment of the Deed Restriction has no bearing on the ZBA's authority to act in this instance, because, as previously stated, the ZBA's jurisdiction *does not* extend to interests in land. Groton, 451 Mass. at 41 (emphasis added). Even if the HAC or a court should find that the Deed Restriction has been treated in a manner similar to local regulations (therefore more akin to permits or approvals) the Board of Aldermen, not the ZBA, is the authority explicitly charged with the administration of the Deed Restriction. Any amendments made to the Deed Restriction were consistent with the authority vested in them by Deed and M.G.L. c. 40, § 3, and c. 39, § 1.

[7] The White Barn Lane case is distinguishable from the Wells Avenue Deed Restriction because it involved a covenant imposed by the Norwell Planning Board, whereas the Wells Avenue Deed Restriction was accepted by the City pursuant to an option agreement granted to the City by the owners of the property, and which established the parameters of the Deed Restriction. The Groton case involved an improper determination by the HAC that it had the authority to order the town to convey an easement to the developer in order for the developer to regrade and clear vegetation on a portion of the town's property. Groton, 451 Mass. at 38.

V. Conclusion.

Both statutory and resulting case law are abundantly clear that the authority of the ZBA under the Act does not extend to interests in land. For the reasons stated above, the ZBA lacks the authority to grant the approvals and relief from the Deed Restriction as requested by the Applicant.

ATTACHMENT G

G

ferriter
scobbo &
rodophele PC
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June 13, 2014

VIA COURIER

Julie Ross, Esq.
Assistant City Solicitor
City of Newton Law Department
1000 Commonwealth Avenue
Newton, MA 02459

Re: 135 Wells Avenue LLC

Dear Ms. Ross:

I hope that you are doing well.

Enclosed is a memorandum that summarizes the LLC's research into the question of whether the Zoning Board of Appeals may grant the LLC the relief it has requested under chapter 40B from the Wells Avenue Restrictions.

We would be happy to meet with you and other members of the Law Department if you feel it would be helpful.

Cordially,

Michael D. Vhay

Enclosure

MDV/mef

cc: Ouida Young, Esq. (by hand, w/enclosure)

MEMORANDUM

TO: Ouida Young, Esq., Associate City Solicitor, City of Newton
Julie Ross, Esq., Assistant City Solicitor, City of Newton

FROM: Michael D. Vhay & Valerie A. Moore (Ferriter Scobbo & Rodophele, PC)
Charles N. Le Ray (Dain, Torpy, Le Ray, Wiest & Garner, PC)

DATE: June 12, 2014

RE: 135 Wells Avenue/Wells Avenue Restrictions

QUESTION PRESENTED

Whether the owner of 135 Wells Avenue (the "Site") may use the comprehensive permit process available under M.G.L. c. 40B, §§ 20–23 ("Chapter 40B" or "c. 40B") to obtain relief from certain restrictive covenants (the "Wells Avenue Restrictions") that were imposed on the Site and are administered by the Board of Aldermen (the "Board")?

BRIEF ANSWER

Because amendments to the Wells Avenue Restrictions are, and have been treated by the Board as, local approvals, Chapter 40B authorizes the Newton Zoning Board of Appeals to grant any relief from the restrictions that is necessary for the development of a multifamily project at 135 Wells Avenue, as part of a comprehensive permit decision.

FACTUAL BACKGROUND

I. The 135 Wells Avenue Project

135 Wells Avenue, LLC (the "Applicant") owns 135 Wells Avenue in Newton (the "Site"). The Site is located in Ward 8, Section 84, Block 34, Lot E2. The Site contains approximately 276,492 square feet of land and currently houses a health and tennis club known as Boston Sports Club. The current building and uses of the Site have evolved through a series of local approvals granted since 1971. The Site is one of the several properties that comprise the Wells Avenue area. The City has

zoned all parcels on Wells Avenue into a Limited Manufacturing District; according to the Newton Zoning Map, this is the only such district remaining in the City. The Applicant proposes to construct a 334-unit residential project at the site and has applied to the Newton Zoning Board of Appeals for a Chapter 40B comprehensive permit for the project.

II. The Wells Avenue Restrictions

On April 14, 1960, Sylvania Electric Products, Inc. had an option to purchase an approximately 180-acre parcel off Nahanton Street in Newton. Sylvania petitioned the Aldermen to rezone the parcel. *Sylvania Electric Products, Inc. v. City of Newton*, 344 Mass. 428, 430 (1962). During the course of subsequent public hearings by and consultations with the Newton Planning Board, Newton's planning consultant, and the Aldermen, the parties agreed that certain additional restrictions would be imposed on the land as a condition of rezoning. The Planning Board voted to recommend the zoning amendment to the Board of Aldermen, but suggested that certain "conditions be obtained by agreement with the proper parties concerned, if the Board of Aldermen is favorably disposed to the zone request." *Id.* at 430 n.3. The Planning Board's proposed "conditions" became the Wells Avenue Restrictions. *Id.* at 430. The Board of Aldermen adopted the restrictions in Board Order #276–68(3).

These restrictions were set out in a draft deed attached to a proposed option agreement whereby Sylvania would give the City an option to purchase, within 30 years, a strip of land on the west and southwesterly (river) side of the parcel. Under the option agreement, Sylvania would abide by the restrictions in the draft deed during the option term, so that if the city were to exercise its option the restrictions would not already have been violated. *Sylvania Electric Products, Inc.*, 344 Mass. at 430–431.

By ordinance enacted on June 27, 1960, the Aldermen rezoned from Single Residence A to Limited Manufacturing 153.6 acres of the land on which Sylvania had an option. *Sylvania Electric*

Products, Inc., 344 Mass. at 429. At the time, one other parcel of land in Newton had been zoned as an LM district. *Id.* Sylvania took title to the parcel on July 6, 1960. *Id.* at 432. Later that day, Sylvania executed the option agreement including the agreed-upon restrictions. *Id.* Certified copies of the June 27, 1960 zoning ordinance, the Board of Aldermen order authorizing the Mayor to accept the option, and the option agreement were recorded on July 8, 1960. *Id.* at 432.

On May 31, 1962, the Massachusetts Supreme Judicial Court upheld the rezoning of Sylvania's land pursuant to Sylvania's agreement with the Aldermen. *Id.* at 429.

Sylvania subsequently decided not to develop the property. By deed dated October 26, 1967, recorded with the Middlesex (South) Registry of Deeds (the "Registry") in Book 11419, Page 029, Sylvania conveyed its Nahanton Street property to Isadore Wasserman and Stephen Hopkins, as Trustees of The Newton at 128 Realty Trust. The deed conveyed the premises subject to the option agreement and the restrictions established therein. On December 5, 1968, Isadore Wasserman and Stephen Hopkins, as Trustees of Newton at 128 Realty Trust, and the Aldermen recorded an Amendment to Option Agreement, replacing the form of attached deed to reflect that Sylvania had conveyed the property to the trust, and amending the thirty-year option period to start on December 1, 1968. Registry Book 11676, Page 562.

The Newton at 128 Realty Trust laid out Wells Avenue and subdivided the former Sylvania land into Parcel 2 (the City's option parcel) and development lots within and surrounding Wells Avenue. *See* Registry Plan 414 of 1969. The Newton Planning Board approved this subdivision plan on September 11, 1968; the plan was recorded on May 7, 1969. *Id.*

By deed dated May 22, 1969, Isadore Wasserman and Edwin M. Howard, as Trustees of Newton at 128 Realty Trust, conveyed Parcel 2 to the City, subject to restrictions for the benefit of Grantors' remaining land that for ninety-nine years no buildings or structures would be built on Parcel 2 except for recreation, conservation, or parkland purposes, and imposing on Grantor's

remaining land the restrictions agreed upon by Sylvania and the City in 1960. Registry Book 11699, Page 535 (June 26, 1969).

Subsequently, the Newton at 128 Realty Trust conveyed the various development lots (in some instances after further subdividing the original subdivision parcels).

Since May 1969, the Board has adopted orders amending the Wells Avenue Restrictions on at least fourteen different occasions; four of the orders relate to the development and expansion of a tennis club (now general health club) facility at 135 Wells Avenue.

LEGAL ANALYSIS

The Massachusetts legislature enacted Chapter 40B to overcome local restrictions to building affordable housing in communities that lack it. *See Board of Appeals of Hanover v. Housing Appeals Committee,* 363 Mass. 339, 346-66 (1973); St.1969, c.774 ("An Act Providing for the Construction of Low or Moderate Housing in Cities or Towns in Which Local Restrictions Hamper Such Construction"). To facilitate the permitting of affordable-housing developments, c. 40B, § 21 provides: "Any ... organization proposing to build low or moderate income housing may submit to the board of appeals ... a single application to build such housing in lieu of separate applications to the applicable local boards." Section 21 further states that the board of appeals "shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application." Chapter 40B thus creates a system of "one-stop" permitting for all local approvals an applicant would otherwise need in order to build affordable housing. *See Milton Commons Assoc. v. Board of Appeals of Milton,* 14 Mass. App. Ct. 111, 117 (1982). The power of the board of appeals to grant such permits and approvals includes the ability to "override local requirements and regulations" that restrict construction of affordable housing. *Hanover,* 363 Mass. at 355. If a board of appeals improperly denies the requested comprehensive permit, or conditions its

approval on improper conditions, the applicant may appeal the board's decision to the Housing Appeals Committee ("HAC"). HAC has the same § 21 override powers as the board of appeals.

Thus, whether the Wells Avenue Restrictions are within the scope of c. 40B turns on two questions. First, is the Board of Alderman is a "local board" under c. 40B? Second, is the Board's exercise of its express and implied powers under the restrictions a "permit or approval" that would be needed to build housing on Wells Avenue. The answer to both questions is yes.

I. The Board of Aldermen is a "local board" under Chapter 40B.

Chapter 40B, § 20 defines "local board" as including "any ... city council or board of selectmen ...." A separate statute, M.G.L. c. 4, § 7, states that when the term "city council" appears in the General Laws, for those cities that lack a "city council," the term includes "the board ... having like powers or duties...." In Newton, the Board of Aldermen has both legislative and special permit granting authority and, thus, exercises the powers and duties of a "city council." The Newton Board of Alderman is thus a "local board" under c. 40B, § 20.

II. The Board uses the Wells Avenue Restrictions to grant local "approvals" of developments along Wells Avenue.

Municipalities use equitable restrictions and property covenants as land-use tools. *See, e.g.*, M.G.L. c. 41, § 81U (planning board may require developer to grant covenants to the municipality to enforce conditions upon subdivision approval); c. 184, §§ 31–33 (historic preservation, conservation, and agricultural restrictions); *see also* 34 Am. Jur. Proof of Facts 3d 339, § 4 (1995 & Apr. 2014 Supp.). Here, the Wells Avenue Restrictions gave the City an additional means of enforcing the requirements of the LM District in the event that persons who objected to the rezoning of the Sylvania parcel prevailed on the claims at issue in the *Sylvania Electric Products, Inc.* decision: that the City and Sylvania had conspired to engage in illegal "spot zoning" of Sylvania's land.

Chapter 40B does not define the phrase "permits or approvals". Black's Law Dictionary (2007) defines "permit" as a "written license or warrant, issued by a person in authority, empowering

the grantee to do some act not forbidden by law, but not allowable without such authority." An "approval" is "the act of approving." AMERICAN HERITAGE DICTIONARY (1976).

Chapter 40B does not confine § 21's "permits or approvals" to municipal zoning requirements. The Supreme Judicial Court has held that the phrase includes any governmental action "typically given on application to and evaluation by, separate local agencies, boards or commissioners whose approval would otherwise be required for a housing development to go forward." *Zoning Bd. of Appeals of Groton v. Housing Appeals Committee*, 451 Mass. 35, 40 (2008). Such actions include:

- Town-meeting approvals of sewer extensions. *See Board of Appeals of Maynard v. Housing Appeals Committee*, 370 Mass. 64, 68-69 (1976).
- Regional historic-district permits. *See Dennis Housing Corp. v. Dennis Zoning Bd. of Appeals*, 439 Mass. 71 (2003).
- Local wetland by-law approvals, local board of health requirements and site-plan approvals. *See Green View Realty, LLC v. Holliston Zoning Bd. of Appeals*, HAC No. 06-16 (Jan. 12, 2009); *Archstone Communities Trust v. Woburn Bd. of Appeals*, HAC No. 01-07 (June 11, 2003).
- Overrides of local water-department rules. *See Peppercorn Village Realty Trust v. Hopkinton Board of Appeals*, HAC No. 02-02 (Jan. 26, 2004)

An HAC decision squarely addresses covenants granted to municipalities. In *White Barn Lane, LLC v. Norwell Zoning Board of Appeals*, HAC No. 08-05 (July 18, 2011), the Norwell Zoning Board of Appeals granted a comprehensive permit for construction of 40 affordable townhouse condominiums. Developer White Barn sited the project on three parcels within a previously approved subdivision. The subdivision's parcels were subject to a covenant running in favor of the Norwell Planning Board that was recorded with the definitive subdivision plan. *Id.* at 3; *see also* M.G.L. c. 41, §§ 81O, 81U.

While the ZBA granted a comprehensive permit for the project, it refused to waive the recorded Planning Board covenants that prevented further subdivision, limited improvements to the

subdivision's roadways, and required advance approval by the Planning Board of any re-grading. *Id.* at 26. The ZBA acknowledged that its refusal to modify the covenants could have blocked the development, as White Barn's proposal entailed substantial re-grading and modifications to subdivision roadways. *Id.* at 27.

White Barn appealed the ZBA's decision to HAC. HAC held that "the decision whether to modify a [subdivision] covenant is a question under local law, and therefore appropriate for consideration by the Board [of Appeals] under *Woodridge Realty Trust v. Ipswich,* [HAC No. 00-04 (June 28, 2001)], subject to the restrictions set out in *Groton*, [451 Mass. 35]." *White Barn*, HAC No. 08-05 at 28. HAC evaluated each covenant modification requested by White Barn as it would any other approval request, by assessing whether the ZBA had shown a valid local concern to justify not modifying the covenant. HAC held, for example, that no valid local concern justified pre-approval by the Planning Board of White Barn's grading plan (as opposed to review by the ZBA). *Id.* at 28.

The Board of Alderman has exercised the City's powers under the Wells Avenue Restrictions to regulate development along Wells Avenue. The Board has done so through an "express" mechanism found in the restrictions and an "implied" mechanism.[1] Restriction No. 3 expressly requires "prior approval" of the Board with respect to "finished grading and topography, drainage, parking and landscaping" of all developments along Wells Avenue.

The Board also has inferred from the Wells Avenue Restrictions the power to amend those restrictions. The Board has amended the restrictions at least fourteen times, including four amendments relating to the 135 Wells Avenue property. Each amendment has followed an application to the Board by the owner of the affected Wells Avenue property. Approval by the full

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[1] Further, the City's Inspectional Services Department has interpreted and enforced the Wells Avenue Restrictions as if they were traditional zoning requirements. *E.g.*. Letter from John D. Lojek, Commissioner of Inspectional Services, to Howard Levine (Feb. 29, 2012) (discussing application of Newton Zoning Ordinance and "Option Agreement" restrictions to Newton Wellesley Hospital project at 159 Wells Avenue, concluding that project was "by right").

Board has followed review and recommendation by the Board's Land Use Committee. That Committee "reviews matters relating to Special Permit and Site Plan Approval petitions [and] zone change petitions relating to individual, specific parcels ...." Land Use Committee website (reviewed Mar. 21, 2014).

Here, the Board's very first amendment to the Wells Avenue Restrictions states that the Board considered the application according to the standards the Board traditionally uses in considering requests for special permits. *Compare* Board Order #734-72 (increasing limit on gross floor area along Wells Avenue: "That the Board finding that the public convenience and welfare will be substantially served by its action and that said action will be without substantial detriment to the public good, and without substantially derogation from the intent or purpose of the zoning ordinance, the following amendment to restrictions ... is hereby granted ...") *with* Newton Zoning Ordinance, § 30-24(d) ("The board of aldermen may grant a special permit when, in its judgment, the public convenience and welfare will be served, and subject to such conditions, safeguards and limitations as it may impose.") *and* § 30-24(h) ("The board of aldermen shall not approve any application for a special permit unless it finds that said application complies in all respects with the requirements of this ordinance."). Much as special permits and variances modify as-of-right zoning requirements, the Board's amendments have modified dimensional requirements or have allowed uses not originally permitted by the Wells Avenue Restrictions (for example, for-profit children's gymnastics, the Solomon Schechter Day School, the Russian School of Mathematics, the Massachusetts School of Professional Psychology, Boston Sports Club, and Iggy's Bakery). The Board has treated its amendments to the Wells Avenue Restrictions as exercises of its zoning powers.[2]

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[2] *See, e.g.*, Land Use Committee Report, #56-12 (Mar. 13, 2012) ("This is a request to amend a restrictive covenant which was put into place instead of standard zoning controls for what is now known as the Wells Avenue Office Park. This

The Board of Aldermen's exercise of its express and implied powers under the Wells Avenue Restrictions with respect to developments along Wells Avenue falls easily within the plain meaning of the phrase "permits or approvals." The SJC and HAC precedents suggest that HAC and the courts would treat the Board's amendment of the restrictions' limits on the dimensions of structures and the allowed uses along Wells Avenue as a local "approval" subject to Chapter 40B.

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type of zoning control through land restriction instead of standard zoning controls was not uncommon, but is the only such instance in Newton.").

MEMORANDUM

TO: Brooke K. Lipsitt, Chairman, Zoning Board of Appeals, City of Newton
Vincent Farina, Member, Zoning Board of Appeals, City of Newton
Barbara Huggins, Member, Zoning Board of Appeals, City of Newton
Treff La Fleche, Member, Zoning Board of Appeals, City of Newton
Michael J. Quinn, Member, Zoning Board of Appeals, City of Newton

CC: Donnalyn Kahn, Esq., City Solicitor
Ouida Young, Esq., Associate City Solicitor, City of Newton
Julie Ross, Esq., Assistant City Solicitor, City of Newton
Board of Aldermen

FROM: Michael D. Vhay & Valerie A. Moore (Ferriter Scobbo & Rodophele, PC)

DATE: August 1, 2014

RE: 135 Wells Avenue/Wells Avenue Restrictions

135 Wells Avenue, LLC (the "Applicant") proposes to build a 334-unit mixed use development at 135 Wells Avenue (the "Site"). The Applicant seeks a comprehensive permit under Massachusetts General Laws chapter 40B, sections 20-23 ("Chapter 40B") to build the development. Chapter 40B gives the Newton Zoning Board of Appeals (the "ZBA") the statutory responsibility to grant or deny the Applicant's application.

As part of its application, the Applicant seeks approvals and, in some cases, relief from restrictive covenants (the "Wells Avenue Restrictions") that affect the Site and are administered through the Board of Aldermen (the "Board") and the Mayor. At the request of the ZBA, the Applicant is furnishing this memorandum to:

- Describe the ZBA's authority to step into the shoes of both the Board and the Mayor, and grant all approvals needed under (or as a result of) the Wells Avenue Restrictions
- Reconcile that authority with the Supreme Judicial Court's decision in *Zoning Board of Appeals of Groton v. Housing Appeals Committee,* 451 Mass. 35 (2008) ("*Groton*").

We conclude that the ZBA has the power to grant the requested approvals and waivers, as none requires the ZBA to compel the City to grant the Applicant an easement or any other interest in City-owned real estate.

Factual Background

A. The Site

The Applicant owns the Site. The Site is located in Ward 8, Section 84, Block 34, Lot E2. The Site is one of the several parcels on Wells Avenue. The Site contains approximately 276,492 square feet of land and currently houses a health and tennis club known as Boston Sports Club. The current building and uses of the Site were not allowed under the original Wells Avenue Restrictions, but they have evolved through a series of local approvals (including amendments of the Restrictions) granted since 1971. A chart summarizing those approvals (and others) is attached as Exhibit A to this memorandum. The City has zoned all parcels on Wells Avenue into a Limited Manufacturing ("LM") District.

B. Origins of The Wells Avenue Restrictions

In 1960, Sylvania Electric Products, Inc. had an option to purchase an approximately 180-acre parcel off Nahanton Street in Newton. Sylvania petitioned the Board to rezone the parcel. *See Sylvania Electric Products, Inc. v. City of Newton*, 344 Mass. 428, 430 (1962). During the course of subsequent public hearings by, and consultations with, the Newton Planning Board, Newton's planning consultant, and the Aldermen, the parties agreed that certain additional restrictions would be imposed on the parcel as a condition of rezoning. The Planning Board expressly recommended that certain "conditions be obtained by agreement with the proper parties concerned, if the Board of Aldermen is favorably disposed to the zone request." *Id.* at 430 n.3.

The Planning Board's proposed "conditions" became the Wells Avenue Restrictions. *Id.* at 430. The Board of Aldermen adopted the Restrictions in Board Order #276–68(3). Originally, the Restrictions were set out in a draft deed attached to a proposed option agreement (the "1960 Option Agreement") whereby Sylvania would give the City an option to purchase, within 30 years, a strip of land on the west and southwesterly (river) side of the Sylvania parcel. Under the 1960 Option Agreement, Sylvania agreed to abide by the restrictions in the draft deed during

the option term, so that if the City were to exercise its option, the restrictions would not already have been violated. *Sylvania Electric Products, Inc.*, 344 Mass. at 430–431.

By ordinance enacted on June 27, 1960, the City rezoned 153.6 acres of the land on which Sylvania had an option from Single Residence A to Limited Manufacturing. *Id.* at 429. Sylvania took title to the parcel on July 6, 1960. *Id.* at 432. Later that day, Sylvania executed the 1960 Option Agreement, including the agreed-upon Restrictions. *Id.* Certified copies of the June 27, 1960 zoning ordinance, the Board's order authorizing the Mayor to accept the option, and the 1960 Option Agreement were recorded on July 8, 1960. *Id.* at 432.

Several residents challenged the City's rezoning of the Sylvania parcel, and its tie to the 1960 Option Agreement, as illegal "spot zoning" or "contract zoning." On May 31, 1962, the Supreme Judicial Court upheld the rezoning of Sylvania's land, notwithstanding the 1960 Option Agreement. *Id.* at 429.

Sylvania subsequently decided not to develop its parcel. By deed dated October 26, 1967, recorded with the Middlesex (South) Registry of Deeds (the "Registry") in Book 11419, Page 029, Sylvania conveyed its Nahanton Street property to Isadore Wasserman and Stephen Hopkins, as Trustees of The Newton at 128 Realty Trust (the "Trust"). The deed conveyed the premises subject to the 1960 Option Agreement and the restrictions described therein. On December 5, 1968, the Trustees of the Trust and the City recorded an Amendment to Option Agreement, replacing the form of the proposed deed that was attached to the 1960 Option Agreement to reflect that Sylvania had conveyed the property to the Trust, and amending the thirty-year option period to start on December 1, 1968. Registry Book 11676, Page 562.

The Trust laid out Wells Avenue and subdivided the former Sylvania land into Parcel 2 (the City's option parcel) and development lots within and surrounding Wells Avenue. *See* Registry Plan 414 of 1969. The Newton Planning Board approved this subdivision plan on September 11, 1968; the plan was recorded on May 7, 1969. *Id.*

By deed dated May 22, 1969, Isadore Wasserman and Edwin M. Howard, as Trustees of the Trust, conveyed Parcel 2 to the City and, pursuant to the amended 1960 Option Agreement,

imposed on the Trust's remaining land the Wells Avenue Restrictions. Registry Book 11699, Page 535 (June 26, 1969). The conveyance of Parcel 2 and the recording of the Restrictions on the Trust's remaining land fulfilled the promises Sylvania had made to the City as a condition of the City's 1960 rezoning of Sylvania's land.

C. The City's Administration of the Restrictions

Since 1969, the Wells Avenue Restrictions have operated as a "restrictive covenant."[1] A restrictive covenant is a formal promise between two property owners, often written into a deed or a lease. In a typical restrictive covenant, the Owner of Parcel A promises the Owner of Parcel B that Owner A, and anyone who subsequently purchases Parcel A, will not use Parcel A in a particular way. Owner B, and anyone who subsequently owns Parcel B, are often described as "benefiting" from the restrictive covenant on Parcel A. A restrictive covenant differs from an "easement" in that a restrictive covenant does not give Owner B any right to enter, cross, occupy, or place things on Parcel A. A restrictive covenant allows Owner B only to control, to the extent described in the covenant, what happens on Parcel A. *See Myers v. Salin*, 13 Mass. App. Ct. 127, 133-134 (1982).

As summarized in Exhibit A, since May 1969, the Board has adopted orders amending the Wells Avenue Restrictions on at least fourteen different occasions. Six of the orders relate to the development and expansion of a health and tennis club at the Site. The Board and the Mayor have exercised the City's powers under the Wells Avenue Restrictions to regulate development along Wells Avenue in two ways.[2] First, Restriction No. 3 requires "prior approval"

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1. See, e.g., Land Use Committee Report, #56-12 (Mar. 13, 2012) ("This is a request to amend a restrictive covenant which was put into place instead of standard zoning controls for what is now known as the Wells Avenue Office Park. This type of zoning control through land restriction instead of standard zoning controls was not uncommon, but is the only such instance in Newton.").

2 The Board and the Mayor are not the only City officials who have administered the City's powers under the Wells Avenue Restrictions. On at least one occasion, the City's Inspectional Services Department interpreted and enforced the Restrictions as if they were traditional zoning requirements. *See* Letter from Commissioner of Inspectional Services to Howard Levine (Feb. 2012) (discussing the application of the Newton Zoning Ordinance and the "Option Agreement"

of the Board with respect to "finished grading and topography, drainage, parking and landscaping" of all developments along Wells Avenue. Exhibit A provides examples of the Board's exercise of this express approval power.

Second, in those instances where Wells Avenue property owners have sought to use their parcels (or erect structures) not allowed under the Restrictions, upon application by the owner, the Board and the Mayor have amended the Restrictions. Exhibit A lists most, if not all, of those amendments. Approval by the full Board has followed review and recommendation by the Board's Land Use Committee. Following majority vote by the Board, the Mayor, per the City Charter, usually signs the amendment to make it final.

Legal Analysis

I. Under Chapter 40B, the ZBA may act as the Board of Aldermen and the Mayor with respect to granting all approvals necessary under the Wells Avenue Restrictions for construction of affordable housing at the Site.

The Massachusetts legislature enacted Chapter 40B to overcome local obstacles to building affordable housing in communities that lack it. *See Board of Appeals of Hanover v. Housing Appeals Committee,* 363 Mass. 339, 346-66 (1973). This intent is manifest in the title of chapter 774 of the Acts and Resolves of 1969, the act that created Chapter 40B: "An Act Providing for the Construction of Low or Moderate Housing in Cities or Towns in Which Local Restrictions Hamper Such Construction."

To facilitate the permitting of affordable-housing developments, section 21 of Chapter 40B provides: "Any ... organization proposing to build low or moderate income housing may submit to the board of appeals ... a single application to build such housing in lieu of separate applications to the applicable local boards." Section 21 gives the board of appeals "the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application."

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restrictions to the Newton Wellesley Hospital project at 159 Wells Avenue; Commissioner concludes that the project was "by right").

Chapter 40B creates a system of "one-stop" permitting for all local approvals an applicant would otherwise need in order to build affordable housing. *Milton Commons Assoc. v. Board of Appeals of Milton*, 14 Mass. App. Ct. 111, 117 (1982). The power of the ZBA to grant such permits and approvals includes the ability to "override local requirements and regulations" that restrict construction of affordable housing. *Hanover,* 363 Mass. at 355.

Whether the ZBA has the power under Chapter 40B to issue approvals under or amend (waive) the Wells Avenue Restrictions turns on two questions: first, is the Board of Alderman a "local board," and is the Mayor a "local official," under Chapter 40B, section 21; and second, do the Wells Avenue Restrictions create within the meaning of section 21 a system of "permit[s] or approval[s]" that are needed in order to build affordable housing on Wells Avenue. The answer to both questions is yes.

A. The Board of Aldermen and the Mayor exercise the powers of a "local board" and a "local official," respectively, within the meaning of Chapter 40B.

Section 21 gives the ZBA "the same power to issue permits or approvals as any *local board or official* who would otherwise act "with respect to an application to build affordable housing." (Emphasis added.) Chapter 40B, section 20 defines "local board" as including "any ... city council or board of selectmen...." Another Massachusetts statute, section 7 of Chapter 4 of the General Laws, provides that when the term "city council" appears within any statute among the General Laws (including Chapter 40B), for those cities that lack a "city council," the term includes "the board ... having like powers or duties...."

In Newton, the Board of Aldermen exercises the powers and duties of a "city council" or "board of selectmen." *See City of Newton Charter*, sections 1-2, 2-3. Because the Board of Aldermen has the same powers and duties as a City Council, the Board of Aldermen is a "local board" under section 20 of Chapter 40B.

Similarly, when the Mayor administers the Wells Avenue Restrictions, he is a "local official" for purposes of chapter 40B. The Housing Appeals Committee ("HAC"), the state board charged with hearing appeals by developers from local 40B decisions, has interpreted "local

official," as used in Chapter 40B, to mean anyone "having supervision of the construction of buildings" and those "who would otherwise act with respect to the comprehensive permit application." *Sugarbush Meadow, LLC v. Sunderland Bd. of Appeals*, HAC No. 08-02 (June 21, 2010).

Under *Sugarbush*, the Mayor is a "local official." If the Applicant wanted to build its development without using the Chapter 40B comprehensive-permit process, the Applicant would have to obtain an amendment of the Wells Avenue Restrictions. The Board would have to vote whether to amend the Restrictions. If the Board approves an amendment, in accordance with sections 2-9 and 3-8 of the City Charter, the Board would present the measure to the Mayor for signature. Because the Mayor would "otherwise act" with respect to the Applicant's development if it were proceeding outside of the Chapter 40B process, he is a "local official" whose approval falls within the jurisdiction of the ZBA under Chapter 40B.

B. The Board and the Mayor have used their powers under the Wells Avenue Restrictions to grant local "approvals" for developments along Wells Avenue.

Chapter 40B does not define the phrase "permits or approvals" as it appears in section 21. Black's Law Dictionary (2007) defines "permit" as a "written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority." An "approval" is "the act of approving." American Heritage Dictionary (1976). In the *Groton* case, the Supreme Judicial Court held that the phrase "permits or approvals" includes any governmental action "typically given on application to and evaluation by, separate local agencies, boards or commissioners whose approval would otherwise be required for a housing development to go forward." *Groton*, 451 Mass. at 40.

Consistent with *Groton*, the courts and HAC have interpreted section 21 as allowing a ZBA to grant any local approval needed to allow construction of affordable housing. Such approvals include:

- Town-meeting approvals of sewer extensions. *See Board of Appeals of Maynard v. Housing Appeals Committee*, 370 Mass. 64, 68-69 (1976).

- Regional historic-district permits. *See Dennis Housing Corp. v. Dennis Zoning Bd. of Appeals*, 439 Mass. 71 (2003).

- Local wetland by-law approvals, local board of health requirements and site-plan approvals. *See Green View Realty, LLC v. Holliston Zoning Bd. of Appeals*, HAC No. 06-16 (Jan. 12, 2009); *Archstone Communities Trust v. Woburn Bd. of Appeals*, HAC No. 01-07 (June 11, 2003).

- Overrides of local water-department rules. *See Peppercorn Village Realty Trust v. Hopkinton Board of Appeals*, HAC No. 02-02 (Jan. 26, 2004).

A 2011 HAC decision shows that HAC will treat conditions on uses of property that are imposed via restrictive covenants granted to municipalities as any other "permit or approval" under Chapter 40B. In *White Barn Lane, LLC v. Norwell Zoning Board of Appeals*, HAC No. 08-05 (July 18, 2011), a developer applied for a comprehensive permit under Chapter 40B to build a 40-unit affordable townhouse condominium project. The developer sited the project on three parcels within a previously approved subdivision. At the time the town approved the subdivision, the town had required the subdivision's owner (much like the City required Sylvania here) to agree to restrictive covenants that were recorded with the subdivision's definitive subdivision plan. *Id.* at 3; *see also* Massachusetts General Laws chapter 41, sections 81O and 81U (governing subdivisions and a planning board's ability to impose restrictive covenants). The covenants prohibited further subdivision of any properties in the approved subdivision. The covenants also restricted improvements to the subdivision's roadways, and required approval by the Norwell Planning Board of any regrading of the roadways. The covenants stated that they were binding on all future owners of properties contained in the subdivision (which later included the 40B developer), and could not be waived without the approval of the Norwell Planning Board.

While the Norwell ZBA granted a 40B comprehensive permit for the project, it refused to take the place of the Planning Board and issue any approvals or waivers necessary under to the restrictive covenants. *Id.* at 26. The ZBA acknowledged that its refusal to grant those approvals or waivers would block the development, as would be the case here. *Id.* at 27.

The developer in *White Barn* appealed to HAC from the ZBA's refusal to assume the Planning Board's role in amending or waiving the town's restrictive covenants. HAC first acknowledged that a ZBA's ability to override local requirements applies only to those requirements that restrict an owner's use of his own property, and could not be invoked to allow the developer to use someone else's property. *Id.* at 28. HAC nevertheless held that "the decision whether to modify a [restrictive] covenant is a question under local law, and therefore appropriate for consideration by the Board [of Appeals] under *Woodridge Realty Trust v. Ipswich,* [HAC No. 00-04 (June 28, 2001)], subject to the restrictions set out in *Groton....*" *White Barn*, HAC No. 08-05 at 28. HAC then evaluated each of the developer's requests for approvals or modifications under the restrictive covenants to the same extent the Planning Board could have: HAC granted some of the developer's requests, and modified others. *Id.* at 28-30.

That HAC has interpreted chapter 40B's "permits or approvals" language to include modifications or waivers of restrictive covenants should not be surprising. Many municipalities use restrictive covenants to supplement or even replace zoning ordinances. *See* 34 Am. Jur. Proof of Facts 3d 339, § 4 (1995 & Apr. 2014 Supp.). Statutes and ordinances authorizing restrictive covenants include (a) chapter 41, section 81U of the General Laws, which allows a planning board to require developer to grant covenants to the municipality to enforce conditions upon subdivision approval; (b) chapter 184, sections 31–33, which allow municipalities to use restrictive covenants for the purpose of historic preservation, conservation, and agricultural preservation; and (c) HAC's Regulations at 760 CMR 56.04, as well as Newton Zoning Ordinance Section 30-24(f)(8)(e), which require developers of affordable housing to accept a restrictive covenant to limit future re-sales and new rentals of affordable units to households that meet the affordability guidelines. As a current member of the ZBA once wrote concerning another municipality:

> To preserve the long-term affordability of accessory units either newly created or legalized under [its Chapter 40B] amnesty program for accessory units, Barnstable uses deed restrictions, an *essential planning tool.* Such restrictions bind the current owner,

> and all future owners of the property, to renting the accessory unit to low- or moderate income persons or households.

Barbara M. Huggins, *Wrong Again: Massachusetts's Affordable Housing Statute and Smart Growth Zoning,* 72 (Unpublished master's thesis, Tufts University, May 2005) (emphasis added).

We are thus confident that HAC and the courts will treat the powers granted to (and exercised by) the Board and the Mayor under the Wells Avenue Restrictions as "local permits or approvals" that are subject to the ZBA's jurisdiction under Chapter 40B.

II. The ZBA's power to act as the Board of Aldermen and the Mayor in granting approvals under, or amending, the Wells Avenue Restrictions is well within the limits discussed in *Groton*.

Some claim that *Groton* holds that the ZBA may not grant any "local approval" that flows from the Wells Avenue Restrictions. They argue that, because the Restrictions are contained in the City's 1969 deed to Parcel 2, any amendment to the Restrictions constitutes conveyance of the City's "interests in real estate," a conveyance that (under *Groton*) the Newton ZBA is powerless to order under chapter 40B.

That argument is incorrect. *Groton* states at the outset: "This case ... raises the issue whether HAC may require, as a condition to the grant of a comprehensive permit for an affordable housing development project, *that a municipality convey an easement on its land to the project's developer.*" *Groton*, 451 Mass. at 36 (emphasis added). In *Groton*, Washington Green Development, LLC applied to the Zoning Board of Appeals of Groton ("Groton ZBA") for a comprehensive permit under Chapter 40B to build a 44-unit condominium project, with eleven affordable units. The Town of Groton owned land adjacent to the Washington site, on which the Groton Electric Light Department operated a substation. The Groton ZBA denied Washington's application for a comprehensive permit, for two reasons. First, the Groton ZBA determined that the proposed access road to Washington's development, a road on Washington's land, had insufficient stopping-sight distance. Second, the Groton ZBA determined that Washington's road

provided insufficient access for emergency vehicles. Both problems increased the risk of motor vehicle accidents. *Id.* at 37.

Washington appealed the Grton ZBA's denial of the comprehensive permit to HAC. HAC determined that the access road's stopping-sight hazard could be eliminated if a portion of the Town's abutting property were regraded and cleared. HAC also determined that access for emergency vehicles could be made safe if the development had a second access road. The only available route for the road crossed fifteen feet of Town property.

The Town refused to give the developer an easement to regrade and clear the Town's property. The Town also refused to grant a second easement for construction and use of the emergency access road. Invoking its 40B powers, HAC ordered the Town to grant the two easements, claiming that granting an easement was the equivalent of granting a "permit or approval" under chapter 40B. *Id.* at 38.

The Groton ZBA appealed HAC's decision. The Groton ZBA argued that chapter 40B did not empower HAC to order the Town to grant easements to Washington. The SJC agreed. *Id.* at 39-40. The SJC distinguished "limitations on an owner's use of his property," which the court held a ZBA may override under Chapter 40B, from grants of "the use of someone else's property," which are beyond the scope of Chapter 40B. *Groton*, 451 Mass. at 41.

Groton's distinction between "limitations on an owner's use of his property" and grants of "the use of someone else's property" parallels long-standing distinctions under Massachusetts law between restrictive covenants and easements. For example, in *Blakely v. Gorin,* 365 Mass. 590 (1974), the owners of a parcel of land sought a declaration from the court that the "Commonwealth Restrictions," restrictive covenants held by the Commonwealth of Massachusetts to control development on land located in Boston's Back Bay, were obsolete under Chapter 184, section 30 of the General Laws. Section 30 provides that restrictive covenants shall not be enforced unless at the time of the enforcement proceeding they are found to be of substantial benefit to the person trying to enforce them. *Blakely,* 365 Mass. at 591-92.

The *Blakely* defendants -- property owners who were seeking to enforce the restrictions -- claimed that any declaration that the restrictive covenants were unenforceable would amount to an unconstitutional taking of their "interest in property." *Id.* at 595-96. The SJC disagreed. The SJC noted that while the Constitution limits takings of interests in real property, and while the defendants' deeds recited the restrictive covenants that the defendants sought to enforce, the Court held that a restrictive covenant "surely" is not "an interest [in real property] in the ordinary sense of that word." *Id.* at 596. The SJC observed that restrictive covenants are not automatically enforced by the courts, and when they are, they result only in the payment of money damages rather than an order of specific enforcement. *Id. Blakely* refused to give restrictive covenants the same status as other property interests, such as easements. *Id. at 598.*

In contrast to the restrictive covenants at issue in *Blakely, Groton* dealt with easements, which *Groton* defines as "an interest in land which grants to one person the right to use or enjoy land owned by another." *Groton,* 451 Mass. at 39.[3] The Applicant's requests for approvals under and amendments of the Wells Avenue Restrictions – in essence, a waiver of some of the Restrictions – are nowhere close to a request to obtain an easement. The Applicant's requests involve restrictions on the Applicant's right "to use its own land" – the Site -- and not the City's land. The City has no right to enter, use, or occupy the Site, and hence any waiver of the Restrictions will not result in the use or occupation of any City land.

There is one other factor that distinguishes the Wells Avenue Restrictions from the easements at issue in *Groton.* In *Groton*, the Town could not convey an easement in the usual course without following the procedures outlined in chapter 40, sections 3 and 15A of the Massachusetts General Laws. The SJC held that such a statutory process was not a "local

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[3] The distinction between easements and restrictive covenants also plays out among interests sometimes described as "affirmative easements" and "negative easements." An "affirmative easement" gives the beneficiary of the easement the ability to use the land burdened by the easement, whereas a "negative easement" "is a right to compel the person entitled to possession not to use it in specified ways." *Myers*, 13 Mass. App. Ct. at 133-34. *Myers* holds that "negative easements" set forth in a deed are "restrictions," and thus are subject to the same limitations discussed in *Blakely* on enforcement of restrictive covenants. *See id.* at 135-36.

approval" that Chapter 40B could override. *See Groton*, 451 Mass. at 41. By contrast, no state law dictates how the City may amend the Wells Avenue Restrictions. Instead, when amending the Wells Avenue Restrictions, the Board follows a process dictated by sections 2-9 and 3-8 of the City Charter.

Groton no doubt establishes limits on the reach of Chapter 40B: Chapter 40B cannot be used to force a municipality to convey to a developer an easement over City land. HAC acknowledged *Groton's* holding in HAC's *White Barn* decision. Nevertheless, *White Barn* clearly holds that a zoning board of appeals may stand in the shoes of other municipal boards and officials when asked to waive restrictive covenants, for when a covenant controls the developer's "right to use its own land," the decision to waive the covenant is a "local approval" under *Groton.*

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EXHIBIT A

Exhibit A: Approvals under and amendments to Wells Avenue Restrictions

Decision Number & Date	Address	Relief Granted	Conditions on Approval
570-71(2) (6/21/71)	135 Wells Avenue	Approvals: • Finished grading and topography • Drainage • Parking • Landscaping Amendment: • Amend use restrictions to allow a tennis club.	• Finished grades and final construction details shall be to the standards of the City of Newton Engineering Department. • Final location of buildings and plant materials shall be approved by Newton Planning Department.
189-72 (5/1/72)	125 Wells Avenue	Approvals: • Finished grading and topography • Drainage • Parking • Landscaping • Temporary occupancy permit Amendments: • Amend use restrictions to allow a skating facility.	• Finished grades and final construction details of driveways, walks, parking areas, and drainage systems shall be to the standards of the City of Newton Engineering Department. • Final location of buildings, plant materials, and landscape features and screening of dumpsters shall be approved by Newton Planning Department. • Facility is to be situated on Lot E-3 only. • Seating capacity shall not exceed 1400 seats. • No professional games, hockey team exhibitions or practices permitted. • Inlet of the submerged outlet shall be 8" from the bottom of the sump in each catch basin according to the plan, allowing for proper drainage. • City of Newton hockey teams and organizations shall have preference relative to use time. • Entire lot to be kept in good housekeeping order at all times. • Adequate police protection shall be provided at all times during public skating and when hockey games are being played. • No alcoholic beverages shall be allowed on the premises.

Exhibit A: Approvals under and amendments to Wells Avenue Restrictions

Decision Number & Date	Address	Relief Granted	Conditions on Approval
			• Trash collection shall be by private contractor at the sole expense of the petitioners. • Post a performance bond with the penal sum of $15,000 to guarantee completion of all conditions. • Temporary permit shall apply only to the most easterly ice rink, not the other two ice rinks. • City is not responsible for injuries or damages to persons or property resulting from any use of the premises. • All other areas of the premises shall be closed to persons using the only open rink during the temporary permit. • The rink will be used only by hockey teams, their coaches, and managers during the temporary permit.
734-72 (884-71) (8/7/72)	All Wells Avenue Parcels	Amendment: • Amendment to Floor Area Ratio to Land Area calculation to exclude parking structures from the calculation of gross floor area.	• No further site work to be performed in the Industrial Park until preliminary site, grading, and landscaping plans are approved. • Submit preliminary site, grading, and landscaping plan to the Planning Dept. for approval by Aldermen. • Flood Plain and Water Shed Zoning Ordinance now to apply to the Industrial Park. • No further subdivision of Lot B. • No further subdivision of Lot D without approval from Planning Dept. and by the Board of Aldermen. • No salt or chemicals used on roadways.

Exhibit A: Approvals under and amendments to Wells Avenue Restrictions

Decision Number & Date	Address	Relief Granted	Conditions on Approval
254-73 (4/18/73)	135 Wells Avenue	Amendment: • Amend prior site plan to allow an additional outdoor tennis court.	• Outdoor tennis courts will not be lighted. • Outdoor tennis courts may not extend beyond areas shown on the approved plan.
377-75 (6/2/75)	135 Wells Avenue	Approval: • Amendment to prior-approved site plan to ratify "as built" conditions.	• Appropriate means to prevent incursion of motorbikes in Lot E-2. • Grounds be maintained litter-free and in proper order
(9/9/76)*	All Wells Avenue, but to be built at 125 Wells Avenue	Amendment: • Amend use restrictions to allow a squash/racquetball facility.	• Unknown.
417-80 (7/9/80)	125 Wells Avenue	Approval: • Approval of plans for enclosed loading docks and revised parking and landscaping for an existing building.	• Petitioner shall obtain the necessary variances from the Zoning Board of Appeals.
71-87 (3/16/87)	125 Wells Avenue	Approval: • Approval of plans for enclosed loading docks and revised parking and landscaping for an existing building.	• At least one 2.5" caliper tree shall be planted in each island located in the parking lot.

* This Order is referenced in a February 2002 City document listing Amendments to the Wells Avenue Deed Restrictions. The City Archivist has been unable to locate this Order.

Exhibit A: Approvals under and amendments to Wells Avenue Restrictions

Decision Number & Date	Address	Relief Granted	Conditions on Approval
541-89 (1/2/90)	135 Wells Avenue	Amendment: • Amend use restriction to allow two additional tennis courts. • Waive the building restriction lines	None.
282-91 (8/12/91)	135 Wells Avenue	Approval: • Approve grading, drainage, parking, landscaping and lot layout. Amendment: • Amend use restriction to allow tennis and fitness club, a health club, health research and monitoring center, retail shop, food service area. • Waive the building restriction lines.	• Director of Planning must review and approve parking layout, driveway, and landscaping.
293-93 (10/18/93)	135 Wells Avenue	Amendment: • Waive building restriction lines to construct a whirlpool.	None.
469-93 (12/6/93)	125 Wells Avenue	Amendment: • Amend use restriction to allow for non-profit education and religious uses.	None.
428-01(B) (2/19/02)	100 Wells Avenue	Amendment: • Amend limitation on total amount of office space to allow enclosure of an existing loading dock for office space and addition of four parking spaces. • Amend FAR limitation to allow increase in FAR.	None.

Exhibit A: Approvals under and amendments to Wells Avenue Restrictions

Decision Number & Date	Address	Relief Granted	Conditions on Approval
38-03 (4/22/03)	88 Wells Avenue	Amendments: • Amend use restriction to allow for-profit gymnastics academy • Amend limitation on size for free-standing sign.	None.
324-06 & 325-06 (12/18/06)	200 Wells Avenue	Amendment: • Amend use restriction to allow a for-profit dance school and a for-profit mathematics school. • Amend limitation on size for free-standing signs.	None.
231-07 (10/15/07)	135 Wells Avenue	Amendment: • Amend limitation on size for free-standing sign.	None.
56-12 (3/19/12)	1 Wells Avenue	Amendment: • Amend use restriction to permit non-profit educational use.	None.

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ATTACHMENT H A

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June 23, 2014

By First Class and Electronic Mail

Scott F. Lennon, President
City of Newton Board of Aldermen
Newton City Hall
1000 Commonwealth Avenue
Newton, Massachusetts 02459

Brooke K. Lipsitt, Chair
City of Newton Zoning Board of Appeals
Newton City Hall
1000 Commonwealth Avenue
Newton, Massachusetts 02459

Re: Proposed Comprehensive Permit Project, 135 Wells Avenue

Dear President Lennon, Chairman Lipsitt, and Members of the Boards:

This firm represents Mount Ida College ("Mount Ida"). Mount Ida's campus abuts an approximately 6.35-acre parcel of property with a street address of 135 Wells Avenue (the "Property"). The Property is the site of a 334-unit residential development proposed pursuant to the Comprehensive Permit statute, G.L. c. 40B (the "Project"), by Cabot, Cabot & Forbes, Inc. ("CC&F"), doing business as a 135 Wells Avenue, LLC (collectively, the "Developer").[1]

We understand that the Developer is appearing before the Board of Aldermen on June 25th to request that certain deed restrictions on the Property be waived so that the Project can be approved. We understand also that the Developer has submitted a comprehensive permit application (the "Application") and that the Zoning Board of Appeals ("ZBA") hearing on the Application will begin on June 24th.

[1] The comprehensive permit application was submitted by 135 Wells Avenue, LLC, a Delaware company the sole manager of which is Jay Doherty, but the comprehensive permit plans were submitted on behalf of CC&F.

Mount Ida is adamantly opposed to the Project as proposed. It is completely out of scale with other buildings in the Wells Avenue Office Park and the surrounding neighborhood. The Project is a very tall, massive building that will loom over the College's largest dormitory and campus. The height is more than double the allowed height under the Zoning Ordinance. The proposed floor area ratio is more than FIVE times what is allowed by the Zoning Ordinance. The building will not comply with the forty-foot setback requirement of the Ordinance. In all, the Project will require over 20 waivers from City of Newton Ordinances.

Nor will the Project come close to complying with the requirements of the deed restrictions. The Developer is asking that the restriction be amended in the following ways, among others:

1. Allow residential use in an office park;

2. Allow for far less open space (unspecified in Developer's documents) than the 40% open space required; and

3. Allow a floor area ratio of 1.51 where 0.25 is currently the maximum allowed.

We have reviewed documents submitted by the Developer and would like to address the Developer's assertions about the deed restrictions. We believe these assertions to be legally incorrect. The deed restrictions are critical to the City and the surrounding landowners alike, including Mount Ida. They are not local "requirements and regulations" that can be waived by the ZBA or by the Housing Appeals Committee ("HAC") on appeal. Nor are waivers of the deed restrictions permits and approvals that must be granted by the ZBA or HAC instead of the Board of Aldermen.

I. The Project

The Property is in the Limited Manufacturing ("LM") zoning district, where multifamily residential development is prohibited. According to the plans entitled "135 Wells Ave – Mixed-Use Development – Cabot, Cabot & Forbes, Inc. – Comprehensive Permit Set," prepared by Cube 3, dated May 15, 2014 (the "Plans"), the Project comprises 334 apartment units in one large building and 501 parking spaces, many of which are in a garage partially below the surface and partially on the first floor of the building, but many of which also cover portions of the Property not covered by the proposed building.

The Plans show that the proposed six-story building is 69 feet tall and reaches an elevation of 177 feet.[2] The proposed rear yard setback is 28 feet. The back of the proposed building, which will face Mount Ida's campus, is over 200 feet of continuous, block-style architecture, six stories high. The Floor Area Ratio ("FAR") of this building 1.51.[3] The proposed lot coverage is 48%. It is not clear whether this lot coverage calculation includes some or all of the courtyards, but the overall impression is that the building covers far more than 50% of the Property, especially from the perspective of the Mount Ida campus. As shown on the Plans, very little of the Property is not covered by the building or blacktop parking and driveways.

Because of the proposed use, mass and density of the Project in relation to the 6.35-acre lot size, the Project requires many waivers from the City of Newton Zoning Ordinance and other local laws. These include, but are not limited to, waivers from the following: (i) use restrictions, which do not allow multifamily housing; (ii) limitations on the number of stories and building height – which are three stories and 36 feet, respectively; (iii) the minimum rear yard setback requirement of 40 feet and the maximum lot coverage of 25%; (iv) the minimum number of parking stalls, which is 692; and (v) minimum size requirements for parking stalls of 171 square feet (9 feet by 19 feet).

II. The Deed Restrictions

In addition to deviating from the requirements of the Zoning Ordinance, the Project does not comply with the deed restrictions. In a memorandum dated September 19, 2013, submitted to Massachusetts Housing Partnership ("MHP") as part of the site eligibility application, the Developer's counsel noted that the Developer "seeks to amend the so-called Wells Avenue deed restrictions as set forth in Middlesex South District Registry of Deeds Book 11699, Page 535." By letter dated January 7, 2014, Massachusetts Housing Partnership ("MHP") issued its project eligibility determination. The letter states:

> The Project site is subject to a deed restriction held by the City of Newton. Waiver of the deed restriction by the Board of Aldermen to allow for residential use is a condition of final approval.

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[2] The height is probably the result of some sort of calculation taking into consideration changes in topography. Sheet A-200 of the Plans shows a height of about 73 feet from the surface on the northeast by the campus.

[3] For comparison's sake, the existing FAR for the Property is 0.19.

On January 15, 2014, MHP revised this language to read: "Waiver of the deed restriction by the Board of Aldermen or other means as legally applicable to allow for residential use is a condition of final approval." It is not clear why MHP changed the language, but it is likely that the Developer requested the change because it did not like the original language and wanted to make the argument that the deed restrictions are "local requirements and regulations" that can be waived by the ZBA and, if not by the ZBA, then by HAC. Indeed, in a memorandum dated June 12, 2014 addressed to the Associate and Assistant City Solicitors, the Developer's attorneys have now made this assertion. In our opinion, their assertion is wrong.

The deed restrictions have their origination in an irrevocable "Option Agreement" granted by Sylvania Electric Products, Inc. ("Sylvania") to the City on or about July 6, 1960, and recorded with the Middlesex South Registry of Deeds ("Registry") on July 8, 1960, at Book 9630, Page 48. The Option Agreement granted the City the right to purchase an approximately 30-acre parcel of land shown as "Parcel 2" on a Plan dated July 6, 1960, entitled "Plan to accompany Option Agreement form Sylvania Electric Products Inc. to City of Newton," U.M. Shiavone, City Engineer, No. 35436 (the "Option Plan"). The Option Agreement expressly made the grantor's land, shown as "Parcel 1" on the Option Plan, subject to certain restrictions set forth in an accompanying draft deed, for so long as the option was exercisable, and acknowledged that, if the option were exercised, the City could acquire Parcel 2 with the benefit of these restrictions. The draft deed acknowledged that these restrictions are appurtenant to Parcel 2, were imposed on Parcel 1, and would run with the land.

On October 26, 1967, Sylvania conveyed its property, including Parcel 1 and Parcel 2, to Isadore Wasserman and Stephen Hopkins, Trustees of the Newton at 128 Realty Trust (the "Trust"). On December 5, 1968, the Trust amended the Option Agreement to incorporate a new draft deed from the Trust and to make the option exercisable for a 30-year term beginning December 1, 1968.

The City exercised the option, and the Trust granted Parcel 2 to the City by deed dated May 22, 1969, recorded with the Registry at Book 11599, Page 535. The deed expressly imposed the restrictions on Parcel 1, acknowledged that the restrictions were appurtenant to Parcel 2, stated that they run with the land, and included a covenant by the Parcel 1 owner (and successors) that the restrictions "will be faithfully observed and performed." There are numerous restrictions, but the most pertinent ones are as follows:

- At least 40% of any subparcel of Parcel 1 must be open space not occupied by buildings, parking or loading areas.

- The maximum FAR for any subparcel of Parcel 1 is 0.25.
- The land in Parcel 1 can only be used for the purposes enumerated in the restriction, which do not include residential uses.

Those same restrictions were incorporated into the deed when the Trust conveyed the Property to Sports Management Services, Inc., on September 10, 1971 (Book 12073, Page 206), and in the deeds by which the Property was conveyed to the Developer.

The deed restrictions are a matter of title. They are property rights that come from a negotiated agreement between the City and the former property owners and grantors of the option, Sylvania and the Trust. They are rights appurtenant to a particular parcel of land, Parcel 2. They are not local requirements and regulations that can be waived by a board of appeals or HAC under Chapter 40B. Chapter 40B does not authorize HAC or a board of appeals to compel any person to give up property rights. *Zoning Board of Appeals of Groton v. Housing Appeals Committee,* 451 Mass. 35, 40 (2008) (HAC lacks authority to order a private property owner or a town to convey a sight line easement). Rather, the authority to waive local requirements, regulations, permits and approvals under Chapter 40B "refers to building permits and other approvals typically given on application to, and evaluation by, separate local agencies, boards or commissions whose approval would otherwise be required for a housing development to go forward." *Id.* The distinction between "restrictions on the title or use of real property" pursuant to a deed or other title instrument and the "conditions or restrictions set by a government agency, such as a zoning board of appeal," through the exercise of permit-granting authority was also made clear in *Killorin v. Zoning Bd. of Appeals of Andover,* 80 Mass. App. Ct. 655, 657 (2011) (conditions imposed in a permit are not subject to the provision of G.L. c. 184, § 23 that "[c]onditions or restrictions ... shall be limited to the term of thirty years after the date of the deed or other instrument or the date of the probate of the will creating them").[4]

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[4] To argue its point, the Developer cites a number of cases. It is unnecessary to address all of these, although they clearly are distinguishable. For instance, *Maynard v. Housing Appeals Commission,* 370 Mass. 64 (1976), aside from being an old case, concerns the type of approval (sewer extension) typically required for housing development, not a land interest, and was distinguished in the *Groton* decision on that basis. The same is true of all the HAC decisions cited by the Developer, including *White Barn Lane, LLC v. Norwell Zoning Board of Appeals,* HAC No. 08-05 (July 18, 2011), which the Developer touts as "addressing covenants granted to municipalities." This case is no more than a reiteration of the well-settled principle that, under Chapter 40B, a board of appeals assumes the regulatory powers of the planning board under the Subdivision Control Law, including the statutory authority to require or modify covenants for purposes of the Subdivision Control Law. It has no bearing on the deed restrictions at issue here, which were negotiated between the Town and former owners and made appurtenant to the Town's property.

The Developers assert that the Board of Aldermen has amended the deed restrictions fourteen times, including four amendments relating to the 135 Wells Avenue property. That may be true, but whether and how the Board decides to amend the deed restrictions is for the Board to decide, and not for the Developer, the ZBA, or HAC to decide. Mount Ida does not believe that the Board of Aldermen has ever exercised its authority to allow anything the scope, density, and intensity of the Project. Even a cursory review of aerial photographs will show that other developments in the neighborhood do not occupy as much of their respective lots as the Developer now proposes. Further, should the Board amend the prohibition on residential use, you can be assured that there will be a flurry of requests from other property owners in the Office Park for similar amendments – there is currently a strong market for large multifamily apartment projects in greater Boston, especially in affluent suburbs.

As discussed, the modification of the deed restrictions is solely for the Board to decide. Mount Ida urges the Board to deny the Developer's request to modify the deed restrictions.

III. Traffic Improvements

The discussion on deed restrictions raises an important concern about the proposed improvements to the intersection of Nahanton Street and Wells Avenue. These improvements are a critical part of addressing traffic issues arising from the Project. The Planning Department, in particular, has expressed a concern with traffic, especially the frustrating conditions that already exist at this intersection. Without the benefit of more detailed measurements, it does not appear that the existing right of way is adequate for the proposed improvements. To the extent additional land is necessary, the City would have to exercise its power of eminent domain for the benefit of the Project. Chapter 40B "confers no authority on the [housing appeals] committee to order a municipality to convey an easement," and ZBA likewise lacks this authority. *Zoning Board of Appeals of Groton,* 451 Mass. at 139.

IV. Mount Ida's Concerns

The Project would place a massive building with 334 dwelling units adjacent to the part of Mount Ida's campus that is dedicated to student housing and campus life. This building is just 28 feet away from the campus. The 200-foot long, six-story tall back of the building would severely undermine the look and feel of this part of campus. There is no amount of landscaping that can help due to the height, length, and lack of any meaningful backyard setback. But Mount Ida's concerns go beyond aesthetics and campus character. They include the following.

A. Security

Foremost is security. Campus safety is always a paramount concern for colleges. The Property abuts a portion of the campus that houses many of the students, who are generally between the ages of 18 and 21. The existing development is commercial and mostly brings people to the area during daytime business hours on weekdays, times that pose little if any safety concerns. By contrast, the Project would bring a significant number of new people to the area, especially during the evening hours and weekends. In all likelihood, there will be two times as many people as apartments. Moreover, because the apartments are mostly one and two bedroom units, the residents will tend to be more transient than a single-family style development. This has nothing to do with the affordable housing component of the Project. In fact, more than three quarters of the dwellings are market rate units, not affordable units. The concern arises from the type of large, predominantly one and two-bedroom unit apartment complex proposed.

All of these residents will have easy access to the campus – just 28 feet to the border through sparse woods. This raises serious concerns about student safety and will force Mount Ida to concentrate more resources on campus security. A college needs to give its students a secure environment, and failure to do so not only poses a threat to students – which is the most important issue – but also affects the college's appeal to prospective students.

B. Noise and Lighting

Mount Ida strives to maintain a small, quiet residential campus life where students learn to respect their peers and neighbors and are able to focus on their studies. The Project will increase the level of noise that intrudes into the campus, especially during evenings and weekends, and the Project's lighting will likewise be detrimental to the campus life.

C. Traffic

As noted, traffic in the area is already very heavy. Nahanton Street is congested, especially at its intersection with Wells Avenue, and the entry points to the college are often clogged. While the Developer contends that traffic will improve due to a change in direction (e.g., outgoing as opposed to incoming in the morning), there is no debate that the Project will bring a significant amount of new traffic to the area. The traffic pattern may change but it still poses a problem, and not one that is better than existing conditions. The effectiveness of the Developer's shuttle service largely depends on whether the residents work in Boston or some

other place where the MBTA has service, and whether they find the shuttle convenient. This relies on assumptions and is not a given.

D. Shadow

Due to both its height and mass and the lack of any architectural relief, the proposed building will block out natural sunlight and create a shadow over a portion of the campus that includes several residential buildings.

E. Conservation

The deed restrictions exist to protect the City's land use and conservation efforts, including its use of the land it bought pursuant to the option agreement. The Project does nothing to further these efforts; instead, it proposes a density and intensity of use that is detrimental to the area's natural resources. Virtually the entire Property will be used for the 334 dwellings and associated parking. This is inconsistent with the more moderate development in this area and is inconsistent with the purpose of the deed restrictions. What is more, it is well known that a portion of the Property is within the habitat of a species of special concern, the blue spotted salamander, and that there are numerous certified and potential vernal pools in the area. One of these is about 170 feet from the Property. The critical habitat for these rare salamanders extends 300 to 800 feet from a vernal pool. While this may be a matter of state law not strictly within the ZBA's purview under Chapter 40B, it is without question an issue properly considered by the Board of Aldermen in deciding how to act on the Developer's request for modification of the Deed Restrictions.

F. Reliance on City Zoning and the Deed Restriction

Mount Ida recently spent $8.5 million to rehabilitate Mulloy Dormitory, which is the College's largest dormitory and just over 100 feet from the 69-foot tall (plus mechanicals) back wall of the proposed Project. Mount Ida's decision to invest in Mulloy Dormitory was in large part based on the knowledge that although the Dormitory is close to the property line, it abuts commercial property that is subject to the deed restrictions and subject to a 36-foot height limit and a 0.25 floor area ratio under the Zoning Ordinance.

IV. Conclusion

Mount Ida is adamantly opposed to the Project, which is completely out of scale to relative to the other land uses in and adjacent to the Wells Avenue Office Park. The best way to stop it is for the Board to refuse to amend the deed restrictions. We urge the Board to do so.

If there is any information that we can provide to help the Board of Aldermen and the ZBA in their deliberations, please do not hesitate to contact us.

Sincerely yours,

Mount Ida College
By its attorneys

Daniel J. Bailey III
Gareth I. Orsmond

DJB/GIO/smg

cc: Barry Brown, President, Mount Ida College
Cheryl St. Pierre Sleboda, Vice President for Finance and Administration, Mount Ida College
Suzanne Gallagher, Legal Counsel and Special Assistant to the President, Mount Ida College
Alexandra Ananth, Chief Planner, City of Newton Planning Department
Ouida Young, City of Newton Law Department
Franklin Stearns, Esq.

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ATTACHMENT I

CITY OF NEWTON

IN BOARD OF ALDERMEN

November 3, 2014

ORDERED:

That the Board, finding that the proposed amendment can be made without substantially derogating from the purpose for which the City of Newton was granted certain restrictions in a deed from the Trustees of the "Newton at 128 Realty Trust" to the City of Newton dated May 22, 1969 and recorded with the Middlesex South Registry of Deeds in Book 11669, Page 535, the Board hereby agrees to amend the aforesaid restrictions as follows:

PETITION NUMBER:	#210-14
PETITIONER:	135 Wells Avenue LLC
LOCATION:	135 Wells Avenue, Ward 8, Section 84, Block 34, Lot E-2, containing approximately 276,492 square feet of land, more specifically designated as Lot E-2 on a Plan of Land entitled "Existing Conditions Plan, dated June 14, 2013"
OWNER:	135 Wells Avenue LLC
ADDRESS OF OWNER:	c/o Cabot, Cabot & Forbes 125 Summer Street Boston, MA 02111
TO BE USED FOR:	A multi-family dwelling building with café, co-working and accessory space.

1. That the restrictions adopted by Board Order #276-68(3) as conveyed to the City of Newton by a Deed recorded with the Middlesex South District Registry of Deeds in Book 11669, Page 535 as amended, be further amended to allow the use as described above.

2. That the restrictions adopted in unrecorded Board Order #734-72 (#884-71) be further amended to allow the use as described above.

3. That this Order is conditioned upon the Petitioner funding or causing to be performed the off site public improvements listed on Exhibit A of this Board Order.

4. His Honor the Mayor is hereby authorized to execute on behalf of the City such recordable documents as may be usual, customary or necessary to give effect to the Order of the Board herein.

Under Suspension of Rules
Readings Waived and Adopted

[ ] Yeas [ ] Nays

Executive Department
Approved [Date]

_____ _____

City Clerk Mayor

EXHIBIT A

To Board Order #210-14

1. Fund and cause to be designed and reconstructed the Wells Avenue/Nahanton Street intersection as per the plan entitled "Rebuild Nahanton St Intersections at Wells Ave & Winchester St" (the "VHB Plan").

2. If needed, supplement the City's FY 2016-2020 Capital Improvement Plan funding (not to exceed $100,000.00) for the signalization of the Winchester Street/Nahanton Street intersection.

3. Prepare for the City of Newton with the required plans and engineering services (not to exceed $75,000) an application for the City's approval and submission of a MassWorks State grant application (or other similar funding), which would provide funding for additional improvements in the Wells Avenue area.

4. Design and construct a new drop off area serving the Solomon Schechter Day School ("SSDS") consistent with the concept shown on the plan title "Build New Solomon Schechter Pick Up/Drop off Lane."

5. Fund, and or design and construct improvements to the Wells Avenue Park entrance and signage consistent with the concept plan provided to the Board.

6. Cause to be upgraded of all Wells Avenue lighting fixtures to LED along with new arms and banners.

7. Within the public right of way, complete a onetime clean up of heavily overgrown, untended trees and perform landscaping to improve unsightly areas and create a more pedestrian friendly, safe environment (e.g. removal of poison ivy alongside sidewalks).

8. In collaboration with SSDS and Mt. Ida, develop a new, pedestrian friendly entry into the DCR Cutler Reservation across the 135 Wells Avenue property, including new entry features and improved pedestrian trails.

9. Cause to be striped Wells Avenue to include new crosswalks, lane dividers and a bike lane.

10. Work with interested property owners to promote the new Wells Avenue Smart Shuttle.

11. Provide funds not to exceed $100,000 to the City of Newton to begin the master planning, possible re-zoning and "re-branding" of the Park.